MISSISSIPPI LAW JOURNAL

85.18.21
1300.00
6818.2

WRITS IN MISSISSIPPI

A Symposium

December, 1952

VOLUME XXIV NUMBER 1

Make yours a high-quality, low-cost...

MISSISSIPPI LAW LIBRARY

- ◄ American Law Reports, with Permanent Digest
- ◄ American Law Reports, Second Series
- ◄ American Jurisprudence
- ◄ U. S. Supreme Court Reports, L. ed.
- ◄ U. S. Supreme Court Digest Annotated
- ◄ Federal Code Annotated
- ◄ General Texts — Form Books

• Minimum Shelf-space **• Skilled, Quality Editing**

All sets available at extremely liberal terms

The Lawyers Co-operative Publishing Company
Rochester 14, New York

ADVERTISEMENT

a
planned
library

AVOIDS EXPENSIVE DUPLICATION

FOR A PLANNED, WORKING
LIBRARY, WRITE US TODAY
FOR FREE, PERSONALIZED
COUNSELING . . . .

•

BANCROFT-WHITNEY COMPANY

LAW BOOK PUBLISHERS SINCE 1856
McALLISTER & HYDE STREETS SAN FRANCISCO 1, CALIFORNIA

Please mention *The Mississippi Law Journal* when dealing with our *Advertisers*

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXIV DECEMBER, 1952 NUMBER 1

MEMBERS OF THE LAW JOURNAL BOARD

BAR COMMITTEE

W. E. McINTYRE, JR., Brandon
Chairman

WILLIAM O. CARTER, Jackson
THOMAS R. ETHRIDGE, Oxford
HERBERT M. FANT, Sardis
HERMAN GLAZIER, Rolling Fork
WILLIAM O. LUCKETT, Clarksdale
JOSHUA MORSE, III, Popularville
MERLE PALMER, Pascagoula
J. D. THAMES, Vicksburg
L. F. WILLIAMSON, Meridian
WILLIAM F. WINTER, Grenada

FACULTY ADVISER
ARTHUR B. CUSTY

EDITORIAL BOARD

ROBERT H. HODGES
Editor

FRANK W. ALEXANDER
Business Manager

ELWOOD L. EDWARDS
Note Editor

ALBERT A. COVINGTON
THOMAS KENNETH WATTS
Case Editors

JESSE D. PUCKETT
Book Review Editor

ASSOCIATE EDITORS

EARL R. CRUTHIRDS
ARTHUR G. MURPHEY, JR.
GILFORD F. DABBS
JAMES McCLURE, JR.
JOHN WHITE VALENTINE

The JOURNAL seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein.

MISSISSIPPI STATE BAR

1952-1953

OFFICERS

CHARLES B. SNOW OF JACKSON	PRESIDENT
JESSE BOYCE HOLLOMAN OF WIGGINS	FIRST VICE-PRESIDENT
KENNETH I. FRANKS OF PHILADELPHIA	SECOND VICE-PRESIDENT
MRS. ALICE NEVELS OF JACKSON	SECRETARY

COMMISSIONERS

Shelby R. Rogers	Jackson	John H. Holloman	Columbus
J. O. Hollis	Carthage	Herbert M. Fant	Sardis
M. E. Ward	Vicksburg	W. C. Sweat	Corinth
Marvin Williams	Meridian	William Hewes	Gulfport
J. C. Feduccia	Cleveland	Robert B. Smith	Ripley
Warner Beard, Jr.	Laurel	Jerome S. Hafter	Greenville
R. C. Russell	Magee	William R. Ford	Kosciusko
Lena Zama	Hazlehurst	Everett G. Truly, Jr.	Natchez
Earl R. Wilson	Prentiss		

Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

Member, National Conference of Law Reviews
Member of the Southern Law Review Conference

VOLUME XXIV DECEMBER, 1952 NUMBER 1

CONTENTS

LEADING ARTICLES

Nature and Origin of Writs Under the Common Law ..... *John W. Kyle* 1

Writ of Attachment ..... *William F. Winter* 9

Writs of Capias ..... *R. Gordon Grantham* 21

Certiorari ..... *Edgar J. Stephens, Jr.* 27

Writs of Error Coram Nobis and Coram Vobis ..... *Gibson B. Witherspoon* 35

Writ of Distraint ..... *Charles C. Jacobs, Jr.* 41

Writ of Garnishment ..... *R. P. Sugg* 48

Writ of Habeas Corpus ..... *William H. Bizzell* 58

Writ of Inquiry ..... *Walter R. Bridgforth* 75

Lunacy—Writ De Lunatico Inqirendo ..... *Thomas Y. Minniece* 79

Mandamus ..... *Leslie Darden* 95

Writ of Partition ..... *Martha W. Gerald* 100

Writ of Prohibition ..... *Knox White* 104

Quo Warranto ..... *Hugh Clayton* 107

Replevin ..... *Phineas Stevens & Francis B. Stevens* 115

Scrire Facias and Executions ..... *C. Sidney Carlton* 124

Writ of Seizure ..... *Richard E. Stratton III* 138

Sequestration ..... *Nelson Cauthen* 155

STATE BAR SECTION

Revised Rules of the Supreme Court of Mississippi 159

BOOK REVIEWS 166

Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi, under the Act of Congress of March 3, 1879.
Published in October, December, March, and May
EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Here It Is!

A Group Plan of Accident and Sickness Insurance

sponsored Exclusively for Members

by the

Mississippi State Bar

Yes, now you can protect your most valuable asset . . . YOUR EARNING POWER . . . you can insure against loss of income through your Association Plan of Income Protection. Your Plan, which also offers you OPTIONAL HOSPITAL AND SURGICAL BENEFITS, pays a regular weekly income while you're disabled and during those long "payless" days of recuperation that usually follow a disability due to accident or sickness. Your need for this protection is great. That's why your Association is making it available to you. Your Group Plan offers MORE PROTECTION for LESS COST! That's why you should take advantage of this unusual opportunity NOW!

Mail this coupon TODAY to

THOMAS YATES & COMPANY

P. O. Box 1054

Jackson, Mississippi

Please send me more information about the LOW-COST Plan of Income Protection for members.

Name_____

Address_____

Underwritten by CONTINENTAL CASUALTY COMPANY, Chicago, Illinois
America's No. 1 Accident and Sickness Insurance Company

Mississippi Law Journal

VOLUME XXIV DECEMBER, 1952 NUMBER 1

NATURE AND ORIGIN OF WRITS UNDER THE COMMON LAW

*John W. Kyle**

A writ is a precept in writing, couched in the form of a letter, running in the name of the king, president or state, issuing from a court of justice, and sealed with its seal, addressed to the sheriff or other officer of the law, or directly to the person whose action the court desires to command, either as the commencement of a suit or other proceeding or as incidental to its progress, and requiring the performance of a specified act, or giving authority to have it done.[1] Practically all of the writs which are now in use in England and America have a common law origin.

The procedures in which those writs were first used have undergone change as our system of case law has been developed; but the nature of the writs themselves has in most instances remained unchanged. In the matter of criminal procedure, for example, the capias, which is the process issued on an indictment when the person charged is not in custody, still retains its Latin name and serves the same purpose that it served in medieval times. The mittimum, which is a precept in writing issuing from the court or a magistrate, and directed to the sheriff or other officer, commanding him to convey to the prison the person named therein, or to the jailer, commanding him to receive and keep such person until he shall be delivered by due course of law, was perhaps as well known to the sheriff or constable of the thirteenth century as it is to the sheriff or constable of our own time. The scire facias issued when a forfeiture is taken on an appearance bond has undergone little change. The manner of summoning jurors to serve in the trial of cases is now regulated by statute, or by rules of court; but the writ of venire facias has undergone little change since trial by jury came into general use during the time of Henry II. The commitment order, which directs the sheriff to take the convicted person to prison, or the warrant of execution which directs that the death penalty be inflicted, follow the precedents established many centuries ago.

The process used for the commencement of civil actions in the king's court under the common law was an original writ running in the name of

*Associate Justice of the Supreme Court of Mississippi.

[1]BLACK, LAW DICTIONARY (3d ed. 1933).

the king, which was issued out of chancery and sealed with the great seal. The writ was directed to the sheriff of the county wherein the cause of action arose and required him to command the wrongdoer or the person accused to do justice to the plaintiff or else appear in the king's court and answer the accusation made against him. Such writs came into general use during the reign of Henry II (1154-1189).

Stubbs says:

> "The reign of Henry II was the period of amalgamation of the English and Normans so far as concerned their legal and constitutional status. All vestiges of distinction between the two races before the law disappear, and although further changes are required before a perfect union of interest and ideas is completed by a perfect fusion of blood, they are now on an equality, and even the nominal distinction is sunk in the common name of English. Henry himself ascended the throne without any shadow of opposition to his title, and free from any obligations to the factions which had struggled for their own ends under the pretense of supporting Stephen and Matilda. He was fitted for the position of a national sovereign, not only by this freedom from party connexion, but by the training of his earlier years, which had been so changeful and unsettled as to prevent him, although he was the heir of Normandy and Anjou, and by his marriage lord of all the southwest of France, from being moulded into the prevalent type of any of the races which he represented. . . . His great sagacity enabled him to see the true interest of England, and his ability for business to keep in hand the strings of an intricate policy without falling under the sway of any minister whose designs might be more warped by national or party inclinations than his own. . . . His policy was to govern England as an English king to utilize and train all the elements of life by new organization, and, by asserting his royal rights and those of his people, to keep the feudal system in its proper subordination to the national interests."[2]

One of the definite objectives of Henry's policy throughout his long reign was to improve the system of administering justice in his English kingdom and to centralize judicial power in the king's court. By the assize of Clarendon, issued in 1166, the king, "by the counsel of all his barons," made great changes in the administration of the criminal law relating to the prosecution of persons charged with robbery, murder and theft. By the Constitution of Clarendon in 1164, he ordained that any controversy that might arise between a clergyman and a layman with regard to any tenement which the clergyman wished to treat as a free alm, but which the laymen wished to treat as a lay fee, should be decided by an inquest in the presence of the king's justiciar.

---

[2]STUBBS, SELECT CHARTERS 145 (9th ed.).

In 1166, however, Henry took a far more important step in extending the power of the king's court by issuing the first of his possessory assizes, the assize of novel disseisin. By the assize of novel disseisin, it was ordained that, if a person were dispossessed of his tenement unjustly and without a judgment, he was to have a remedy by royal writ. A jury was to be summoned, and the issue was to be tried before the king's justices, and if the verdict went for the plaintiff, he was to be restored to his possession. It was thus made known that while henceforth the ownership of land might be a matter for the feudal courts, the king himself would protect by royal writ and inquest of neighbors every seisin of a free tenement.[3] A few years later the grand assize was instituted; and it was ordained that in a proprietary action for land, an action proceeding in the feudal court, the defending party, the "tenant," as he was called, might have the action removed into the king's court, where the issue could be determined by the verdict of a jury. In the council at Northampton, in 1176, the king promulgated the assize of mort d'ancestor. This, too, was a possessory action, by which, if a person should die while seized and possessed of an estate in land, which was not merely a life estate, his heir could obtain possession of the land as against every other person, even though such other person might have a better right to the land than the dead man. Such right, if it existed, must be asserted in an action, and not by forceful entry against the heir. The assize of mort d'ancestor was most useful in protecting the heir of the deceased holder from an arbitrary seizure of his lands by his feudal lord upon the pretext of making good his seignorial claims.

Other types of writs were devised in the office of the chancellor during the reigns of Henry's sons and grandson which enabled the king's court to hear and determine legal controversies relating to the ownership and possession of personal property; and writs were made available for the enforcement of obligations on bonds and simple contracts, and for the redress of wrongs arising out of trespass, fraud and deceit. These writs set the pattern for the various forms of action which were allowed under the common law: as, for example, for goods detained without force, an action of detinue or trover; or, if taken with force, an action of trespass *vi et armis;* for money due on bond, an action for debt; or, to try the title to lands, a writ of entry, or an action of trespass in ejectment; or, for any consequential injury received, a special action on the case.

Under the new system, if a person had received an injury, and thought it worth his while to demand a satisfaction of it, he might sue out, or purchase by paying the stated fee, an original writ from the court of chan-

[3] 1 Pollock & Maitland, History of English Law 146 (2d ed. 1923).

cery, which was the *officina justitiae,* the shop or mint of justice, wherein all the king's writs were framed. After the writ had been issued, whatever the sheriff did in pursuance of the writ, he was required to certify to the court of common pleas, together with the writ itself, which was the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause.[4]

The next step to be taken after the return of the original writ into the court was the issuance of an original process or summons out of that court itself, being the means of compelling the defendant to appear in court at the return of the original writ; and after that, if the defendant should disobey, a writ of attachment, and then a writ of distress, might be issued.

The writ of attachment was the first process, without any previous summons, upon actions of trespass *vi et armis,* or other injuries, which, though not forcible, were yet trespasses against the peace, as deceit and conspiracy, where the violence of the wrong required a more speedy remedy; and therefore the original writ commanded the defendant to be at once attached by taking gage, that is, certain of his goods which he forfeited if he did not appear. The writ of distress commanded the sheriff to distrain the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands, which he forfeited to the king if he did not appear. If the injury complained of was an injury accompanied by force, a yet more drastic writ might be issued to compel the defendant to appear and answer the complaint, the writ of *capias ad respondendum,* which was a process against the defendant's person; and this writ was later allowed by statute in actions of account, 1285, though no breach of the peace had been suggested, and in actions of debt and detinue, 1351, and in all actions on the case, 1503. If the defendant absconded and none of the above mentioned writs were effective to force him to appear and answer, the plaintiff might then proceed to outlawry. These were the writs of process in the court of common pleas under the early English common law.

The power of the chancellor to issue original writs such as we have mentioned above, returnable to the courts of common law, was in no way related to the equity jurisdiction which the chancellor later acquired. The equity jurisdiction of the court of chancery came into being at a much later date.

The flow of new types of original writs out of the office of the chancellor ceased, however, toward the end of the reign of Henry III (1216-1272); and thereafter the principles of common law procedure could be

---

[4] 3 Bl. Comm. *273.

modified only by legislation or by the common law courts themselves indirectly by the use of legal fictions. The power of the king to administer justice, however, still remained, and that power was exercised during the succeeding centuries by the development of the equity jurisdiction of the court of chancery.

The principle of conducting litigation in accordance with rules of procedure, which varied with the different forms of action found on particular original writs, formed the basis of the English common law for seven centuries; and it was not until 1832 that the English Parliament enacted a Uniformity of Process Act which abolished the original writ in personal actions, and all the other substituted methods of commencing actions, and substituted therefor a writ of summons. Under the Judicature Acts of 1873 and 1875[5] which went into effect November 1, 1875, and later amendments, a modern action, in the popular sense of that word, is now commenced by a writ of summons, which states simply the general nature of the plaintiff's complaint. Neither in the indorsement upon such writ, nor in the subsequent pleadings, is it necessary to state in any particular or stereotyped form the facts upon which he relies. Pleadings are no longer technical in the sense that they must show the precise legal form which the plaintiff's demand must take. The pleadings must only show the facts, and then it is for the court to decide upon the legal result of those facts.[6]

In the United States original writs, properly so called, never existed. The constitutions and the laws of the United States, and of the several states, confer and fix jurisdiction upon the courts. While these writs have been abolished in England, their original functions and their history are yet vital and instructive.

Writs of error were allowed under the common law, and appeals were allowed in equity cases. A writ of error was an original writ, and was used for the purpose of bringing under review alleged errors of law arising on the face of the proceedings, or apparent on the judgment record. The writ of error issued out of the superior court and commanded the trial court to send up the record of the case for examination as to errors of law. The writ of error coram nobis (or vobis), on the other hand, was employed for the correction of errors of fact.

The common law writ of certiorari was an original writ issuing out of chancery or the King's Bench, directed in the king's name to the judges or officers of an inferior court and commanding them to send up the record of a cause pending before them, so that the party might have a

[5] 36 & 37 Vict., c. 66; 38 & 39 Vict. c. 77.
[6] 1 HALSBURY, LAWS OF ENGLAND 47 (2d ed. 1931).

review of all proceedings.[7] In the very early case of *Duggen v. McGruder*,[8] the Mississippi Supreme Court held that a certiorari was not a writ of right, to be granted as a matter of course, without any showing that the law had been violated, or injustice done; and that in civil cases a certiorari should not be granted, where an appeal was allowed, if there was no objection to the want of jurisdiction.

Under the early common law the writ of *procedendo ad judicium* was the remedy to compel an inferior tribunal to proceed to judgment in a given case where the judge of such court was delaying the proceeding. It was an original writ, issuing out of chancery to the judge of a subordinate court, commanding him in the king's name to proceed to judgment, but without specifying any particular judgment.

The writs of prohibition, mandamus and quo warranto are all of common law origin. The writ of prohibition was in use as early as the twelfth century, and Glanvill mentions the writ in his treatise on the forms and procedure in the king's court. Bracton, in the next century, discusses the writ as an established part of the English common law. The writ was made use of by the king's justices during the time of Henry II to restrain the attempted exercise of jurisdiction by the ecclesiastical courts over contracts or promises made by oath or by "pledge of faith." Bracton says that "The royal court is zealous in maintaining its jurisdiction; the plea rolls are covered with prohibitions directed against ecclesiastical judges."[9]

The king's court was not superior to the ecclesiastical courts; it could not reverse their judgments. It could, however, and would prohibit them from meddling with a temporal dispute; and the ecclesiastical judge who infringed a royal prohibition could be haled before the justices and punished.[10] The issuance of the writ of prohibition by the courts of common law in such cases was not unlike the weapon which the courts of common law at a later day saw turned against them by the hand of the chancellor. Prohibition, however, unlike the injunction, was directed to the court itself, commanding it to cease from the exercise of a jurisdiction to which it had no legal claim.

The writ of mandamus appears to have been used at least as early as the time of Edward III. According to the theory of the common law, the king was the fountain of justice, and where the laws did not afford a remedy, and enable the individual to obtain his right by the regular forms of judicial proceedings, the prerogative powers of the sovereign were

---

[7] 10 Am. Jur., Certiorari § 2.
[8] 1 Miss. 112 (1822).
[9] 1 Pollock & Maitland, *op. cit. supra* note 3, at 251.
[10] 2 Pollock & Maitland, *op. cit. supra* note 3, at 665.

brought in as an aid to the judicial powers of the court, and mandamus was issued in his name to enforce the execution of the law. Originally, the writ of mandamus was a letter missive from the sovereign power commanding the party to whom it was addressed to perform the act or duty imposed. Later it obtained sanction as an original writ emanating from the King's Bench. Modern statutes have made little change in the function of the remedy or the procedure.[11]

Quo warranto was a common law remedy. Its origin is obscured by antiquity, and little is known about the early uses of the writ. The writ was a high prerogative writ of right which was used by the king against one who usurped, misused or failed to exercise some office or franchise. If the crown succeeded, judgment of forfeiture or ousterlemain was given against the defendant.[12] To correct the abuse of the royal prerogative in respect to such writ and to give opportunity for a fair and convenient hearing, the procedure was regulated by statute as early as 1278,[13] which statute was superseded by the modern form of an information in the nature of a quo warranto, exhibited on behalf of the crown or a private person called the relator. The remedy by information in the nature of a quo warranto is now regulated by statute. The proceedings are regarded by us as civil proceedings, and the issues are tried according to the rules which govern in the trial of other civil causes.

We have purposely refrained from undertaking to discuss in this introductory article the writ of injunction and the celebrated writ of habeas corpus, for the reason that those writs came into general use at a much later date than most of the writs that we have already mentioned. The writ of injunction is distinctly an equitable remedy, and the power to grant injunctions did not appertain to the common law courts. The power to grant injunctions was exercised by the chancellor, however, as early as the fifteenth century as an incident to the equity jurisdiction of the court of chancery; and that power was finally recognized by the common law courts two centuries later.

Writs of habeas corpus were not unknown to the lawyers of the age of Bracton:

> ". . . but for any habitual use of them for the purpose of investigating the cause of an imprisonment we must wait until a later time.
>
> . . . . . .
>
> "In theory, no doubt, the central court had control over the whole province of criminal justice. We can see, for example, that it will

[11]23 Am. Jur., Mandamus § 3.
[12]18 Encyc. Brit. 857 (14th ed.) .
[13]Statute of Quo Warranto, 6 Edw. I, c. 1.

> sometimes direct a sheriff to send up prisoners to Westminster for trial. . . . We may also believe that if a man who though himself unlawfully imprisoned by the sheriff or by some lord of a franchise made his voice heard in the king's court, the justices had power to order that his body should be brought before them and to liberate him if they were persuaded that his detention was wrongful. But we have seen no definite machinery provided for this purpose, nor do our text-writers speak as if any such machinery was necessary. The central power for the time being seemed to fear much rather that there should not be enough, than that there should be too much imprisonment of suspected malefactors, while upon merely lawless incarceration the appeal of action of false imprisonment seemed a sufficient check."[14]

The protection of the writ of *habeas corpus ad subjiciendum,* "ordering a person detaining another to produce him with the day and the cause of his caption and detention, to do, submit to and receive whatsoever the judge or court awarding such writ shall consider in that behalf," was not made fully effective until the enactment of the Habeas Corpus Act of 1679.[15] That Act was designed to define and regulate the use of the common law writ, to correct imperfections therein, and to make it a speedy remedy by which a person might regain his liberty when illegally detained by another.

The remedy by habeas corpus was brought to America by the colonists, and found a permanent sanction in the Constitution; and the right of the citizen to invoke the remedy in case of unlawful detention was recognized and preserved as a part of our system of government. The states have given constitutional sanction to the writ, and the procedure for obtaining the writ is regulated by statute.[16]

---

[14]2 POLLOCK & MAITLAND, *op. cit. supra* note 3, at 586.
[15]31 Car. 2, c. 2.
[16]25 AM. JUR., HABEAS CORPUS § 6.

WRIT OF ATTACHMENT

*William F. Winter**

The remedy of attachment, which in effect is simply the legal process of levying upon the property of a debtor prior to trial and judgment, presents a study with many facets. It is a procedure which is similar in a number of ways to the remedy afforded in garnishment, and the two writs, indeed, are closely parallel. For the purposes of this discussion, however, only the writ of attachment will be considered.

Historical Background

The right of a creditor to protect his interests by subjecting the property of his debtor to some form of attachment is a right of such antiquity that its origin is difficult to trace. It seems not unlikely that such a procedure has been recognized since the earliest commercial transactions of mankind. There are traces of this action throughout the English law and extending back to the early Roman law. While, generally speaking, it is said that the remedy of attachment as such was not known at common law, it is observed that according to the custom of London merchants, the practice was recognized and enforced in the courts.[1]

The basis for the action in this country has been the statutes enacted in earliest colonial times and frequently encompassing, among other features, the provision for attaching the body of the debtor. With the passing of the melancholy era of debtor imprisonment, however, the enlargement and strengthening of attachment procedures against property has been the result. Such procedures differ rather widely in the various jurisdictions, but throughout there appear certain fundamentals that seem common to the action.[2]

The purpose and function of the process has changed to some extent through the years. Its earliest application seems to have been to compel the appearance of a debtor.[3] Now its chief end would appear to be to seek to insure the satisfaction of anticipated judgments and also to subject property to a judgment where personal service cannot be obtained on the debtor.[4]

The nature of the action has been the subject of considerable speculation. It must be remembered that the attachment proceeding is ancillary

---

* Attorney at Law, Grenada, Mississippi.

1 4 Am. Jur., Attachment and Garnishment §§ 18, 19; Fulwider v. Benda, 62 S.D. 400, 253 N.W. 154 (1934).

2 4 Am. Jur., *op. cit. supra*, § 20.

3 Sherwood v. Porter, 58 Idaho 523, 76 P.2d 928 (1938).

4 Fulwider v. Benda, *supra* note 1; Pullman Palace Car Co. v. Harrison, 122 Ala. 149, 25 So. 697 (1899); Kennedy v. Schleindl, 290 Pa. 38, 137 Atl. 815 (1927).

to the main action based on the indebtedness. The attachment proper is always *in rem,* for it is strictly an action against property.[5] If it or other factors cause the appearance of the defendant, then the main action proceeds *in personam,* although such action remains *in rem* unless the jurisdiction of the defendant is obtained.[6] A judgment, therefore, based on such an action *in rem* can operate to subject only the attached property to the satisfaction of the judgment and cannot operate to authorize an execution on the defendant's property generally.

The conflict of strict versus liberal interpretation is another factor which should be mentioned in connection with attachment. In accordance with the theory that the remedy was not a part of the common law, the courts in some jurisdictions have adhered to the general rule that since the procedure is of statutory origin and since it is a rather harsh and extraordinary remedy, the construction of the statutes should be strict in favor of those against whom the remedy is aimed.[7] On the other hand, the better rule seems to be that strict construction should not be pursued to the extent that the beneficial and remedial purposes of the statutes will be thwarted.[8]

The writ of attachment has been known in Mississippi since the very earliest day of the Territory. The first reference to the process is found in a legislative act of April 10, 1799, providing for the granting of such writs.[9] While, of course, there have been numerous modifications of, and improvements in, the procedure since that long-ago day, the basic outline of the law as presently found on the statute books of the state is strikingly similar to those first enactments. As a matter of fact, two companion acts to the one mentioned above passed at approximately the same time contained many features of our contemporary statutes.[10] Of even greater similarity are the first acts of the State (as distinguished from the Territory), the Absent Debtor Act of June 7, 1822, being the principal basis for our present attachment laws.[11]

---

[5] Clark v. Louisville & Nashville R.R., 158 Miss. 287, 130 So. 302 (1930).

[6] Sherwood v. Porter, *supra* note 3; Pennoyer v. Neff, 95 U.S. 714 (1877).

[7] 4 AM. JUR., ATTACHMENT AND GARNISHMENT § 26; Pullman Palace Car Co. v. Harrison, *supra* note 4.

[8] 4 AM. JUR., *loc. cit. supra;* Smith v. Buck, 119 Ohio St. 101, 162 N.E. 382 (1928); Fulwider v. Benda, *supra* note 1.

[9] SARGENT'S CODE, p. 81 (1939) (Collection of the Original Laws of Miss. Territory, enacted 1799-1800 by Gov. Sargent and the Territorial Judges: prepared by the Historical Records Survey of the W.P.A.).

[10] *Id.* at 95-100. It is interesting to note how the different conditions of that day influenced the language and procedures of the laws, e.g.: "He (plaintiff) is hereby required to cause notice thereof to be advertised in one of the public newspapers of this Territory at least three times whenever a newspaper or newspapers shall be published therein, and shall in like manner cause the same to be advertised in one of the newspapers at the Seat of the United State Government *wherever it may then* be. . . ." (Italics mine).

[11] HUTCHINSON'S CODE, c. 56, art. 4, § 6 (1848).

The present Mississippi law recognizes two types of attachment actions, which are similar in purpose but somewhat different in their scope and method. The first and probably most commonly used is attachment at law, which is confined to actions arising out of contractual relationships or founded upon one of the penal statutes. The other is attachment in chancery, which covers a considerably wider scope, inasmuch as it also embraces actions arising *ex delicto* and in equity. Each action is separate and distinct from the other, with the rules of the chancery court guiding procecure under the latter. These two procedures will be treated separately herein, insofar as possible.

Basis for the Writ in Mississippi

Under Section 2675 of the Code of 1942, the early decisions of our courts indicated a very strict construction of the types of cases where the action could be used. Despite the trend in other jurisdictions to extend the remedy of attachment to other fields,[12] nothing seems to have happened in recent years to cause this statute to be modified or liberalized. The court in the case of *Fellows v. Brown*[13] closed the door on tort actions under this section. There have been, however, a number of decisions seeking to interpret this part of the law. One point which stands out clearly is that a party, in order to pursue the remedy of attachment, must have more than a mere speculative action, such as that held by a surety,[14] although under the provisions of Section 2692, the indebtedness need not have matured in certain instances. The contract may be implied[15] and the damages unliquidated.[16] This is still true even though the breach of contract be tortious in nature.[17]

The real basis for the action in Mississippi is found in Section 2679, which recites the grounds on which the writ may be issued. It is in the interpretation of those provisions that the greatest confusion and uncertainty has existed in connection with this action. The practicing attorney will doubtless be confronted with more problems in fathoming this area of the attachment process than any other.

The most common grounds for attachment is seen in the instances of foreign debtor corporations or debtor non-residents. It is here that the writ is perhaps worked to best advantage. While it would appear at first glance that the application of the test of foreign or domestic corporation, resident or non-resident debtor, would be clear and simple enough to

---

[12] 4 Am. Jur., Attachment and Garnishment § 106.
[13] 38 Miss. 541 (1860).
[14] Henderson v. Thornton, 37 Miss. 448 (1859).
[15] Netherly v. Belden, 66 Miss. 490, 6 So. 464 (1889).
[16] Hall Commission Co. v. Crook, 87 Miss. 445, 40 So. 20 (1906).
[17] Netherly v. Belden, *supra* note 15.

avoid confusion, there has nevertheless been much room for argument, with consequent judicial decisions to spell out more definitely the prescribed procedure. The problem of residence or non-residence is usually posed when the debtor either maintains a home in this state and another state or resides temporarily in one or the other for short periods of time. The court has held as a general proposition that the test of one's non-residence is whether the absence is of such character and so prolonged that the absent debtor cannot be served with ordinary process.[18]

The second grounds the statute cites provides more room for controversy, and the reports contain quite a number of decisions seeking to resolve with greater certainty the specific area of applicability of this provision. While there is some question as to when there has been such a removal of the debtor's person or property as to establish grounds for attachment, the greatest difficulty attaches to the decision of when there is a sufficient prospective removal to bring the case within the statute. There must be more than mere speculation as to the debtor's removal.[19] Where, however, a firm purpose to remove can be established, even though such removal may be months away, and where the object is to evade or defraud creditors, the writ may issue.[20] Attachment will not lie when sufficient permanent property of the debtor remains in the jurisdiction to satisfy the creditors, even though a part of his property may be shipped out of the state.[21] The writ does not apply to exempt property even though it may be removed from the state by a debtor in the avoidance of his creditors.[22] If a general rule can be devised for this section, it would be to the effect that if by removal or proposed removal, a debtor thereby seeks to defraud his creditors, then the writ may be invoked. Throughout the consideration of this subject it must be kept in mind that the remedy is a last-resort kind of proposition to protect creditors from the wily devices of non-paying debtors. If that purpose can always be remembered, the facts of each case will usually serve to provide a fairly clear basis for the determination of whether the writ can and should be used.

The third condition under which the remedy may be invoked deals with absconding or hidden debtors who thus avoid summons. Here the issue is usually more clear-cut and easier of determination. The very

---

[18] Morgan v. Nunes, 54 Miss. 308 (1877). *See also* Lowry Lbr. Co., v. Martin, 144 Miss. 106, 109 So. 849 (1926); Imperial Oil Co. v. Allen, 83 Miss. 27, 35 So. 216 (1903); Brown v. Crane, 69 Miss. 678, 13 So. 855 (1892); Bowers v. Ross, 55 Miss. 213 (1877); Alston v. Newcomer, 42 Miss. 186 (1868).

[19] Bamberger v. Merchants' & Farmers' Bank, 73 Miss. 572, 19 So. 296 (1896).

[20] Myers v. Ferrell, 47 Miss. 281 (1872).

[21] Montague v. Gaddis, 37 Miss. 453 (1859). However, the burden is placed on the defendant to show that he has other ample, visible property to satisfy all claims against him. *See* Pickard v. Samuels, 64 Miss. 822, 2 So. 250 (1887).

[22] Lowry Lbr. Co. v. Martin, *supra* note 18.

nature of this grounds for attachment suggests fraudulent and improper motives on the part of the debtor.

The fourth provisions for issuance of the writ, having to do with ship or boat operators, is limited in its applicability mostly to those jurisdictions adjacent to the navigable waters in and around this state, and is not of general importance. It is interesting to note, however, the special treatment that has been accorded this class of transients, who by the migratory nature of their business have fallen heir to a rather strict and severe limitation in the legal processes afforded them in their business relationships.[23]

The fifth and more frequently used grounds is concerned with concealed property or rights in action which the debtor refuses to apply to the payment of his debts. The court has insisted that to sustain the writ under this sub-section, there must be a showing of both a concealment and a unjust refusal to apply such property to the payment of debts.[24] It matters not that the attempted concealment was unsuccessful. The effort which was calculated to procure concealment is adequate to sustain the issuance of the writ.[25] However, the deliberate under-valuation of his property by the debtor and the intentional misrepresentation of such value has been held not to be concealment within the meaning of the statute.[26]

The assignment, transfer, or intent to assign or transfer property to defraud creditors is the next grounds for attachment. Probably the chief problem here has lain in ascertaining when a fraudulent intent exists. In a Mississippi case, finally decided by the United States Supreme Court, it was held that a debtor is not hereby precluded from giving preference to one or more creditors through a bona fide assignment or transfer if such action was in good faith and not calculated to secure a benefit for himself.[27]

A further grounds for the writ is recited as being the conversion or projected conversion by the defendant of his property into money or evidences of debt so as to place it beyond reach of creditors. As in the previous instances, the element of fraud is the determining consideration

---

[23] This is doubtless a holdover from the Act of February 20, 1840, wherein a complete procedure was specifically prescribed for water craft. HUTCHINSON'S CODE, c. 13, art. 6 (1848).

[24] Crooke v. Deas & Duke, 146 Miss. 260, 111 So. 293 (1927).

[25] Gray v. Valley, 136 Miss. 886, 101 So. 855 (1924).

[26] Roach v. Brannon, 57 Miss. 490 (1879).

[27] Fitzpatrick v. Flanagan, 106 U.S. 648 (1882). Under the Code of 1871 one of the grounds for attachment was a disposition of the property by the debtor "with an intent to defraud his creditors or give an unfair preference to some of them." It was held in the *Fitzpatrick* case that no preference can be unfair which is legal and that in order to be illegal it must be fraudulent. See also Ringold v. Goyer Co., 164 Miss. 261, 144 So. 706 (1932).

here. Mere conversion of property into money is insufficient to support a writ of attachment in the absence of evidence tending to show an intent to defraud creditors. This position is clearly borne out in the few decisions involving this sub-section.[28]

The eighth listed circumstance in which attachment will lie is that of a fraudulently contracted debt for which suit has been or is about to be brought. Again the purpose to defraud is the major factor in deciding when the writ can be used. The cases are in agreement that there must exist the specific intent to defraud at the time the debt was contracted or the obligation incurred.[29] The showing that there was a false warranty, knowingly made, has been held to be sufficient to sustain a finding of a fraudulently contracted debt so as to bring the case within the statute.[30] However, the court has zealously insisted on a showing of fraud, so that in one case even where there was a felony in the contracting of a debt, attachment was held not to lie in the absence of evidence of an intent to defraud creditors.[31]

The concern of the law for that group of debtors who by their speculative activities in dealing in futures might be considered bad credit risks is shown in the next sub-section. In the only case seemingly available under this provision, the court demonstrated considerable respect for this phase of the law by holding that when a debtor dealt in futures as an agent for another, he nevertheless was liable to be attached under this subsection.[32]

The final two grounds for attachment may result from those cases of a debtor's default for public money belonging to a political subdivision or of a debtor bank's acceptance of deposits at a time when it knows of its insolvency or of a debtor bank's publication of a false statement as to its financial condition.

Procedure in Mississippi

In proceeding under the law action, upon filing his affidavit under one of the above discussed provisions, the creditor must give bond, with adequate surety or sureties, in an amount double the sum for which claim is made.[33] The cases appear to be in agreement that an attachment bond is a prerequisite to the validity of any further proceeding under the

---

[28] See Alexander v. Dulaney, 72 Miss. 266, 16 So. 203 (1894).
[29] See note 24 *supra*.
[30] Hambrick v. Wilkins, 65 Miss. 18, 3 So. 67 (1887).
[31] Hughes v. Lake, 63 Miss. 552 (1886).
[32] Dillard v. Brenner, 73 Miss. 130, 18 So. 933 (1895).
[33] Miss. Code § 2680 (1942).

statute.[34] However, in the *Baird* case[35] it was held that in case of non-resident debtors the making of bond is not a condition precedent to the issuance of the attachment. The court, aided by a legislative clarification and liberalization of the statutes,[36] has used a generous yardstick in determining the sufficiency of such bonds, particularly as to the factor of the authority of their makers. Almost every kind of agency relationship has been held to be a sufficient compliance with the statute.[37]

Broad leeway to perfect proceedings in attachment is permitted under Section 2682, wherein it is provided that any defects in the bond or affidavit may be cured by amendment without prejudicing the action in any regard. Therefore, a defective affidavit may be amended by adding an entirely new ground for attachment,[38] and a bond signed by sureties in a partnership name may be amended by allowing each partner to sign his own name.[39]

Upon the filing of the affidavit and the entering into a sufficient bond, the next step in the attachment process is the issuance of the writ of attachment, whereby the sheriff or other proper officer of the county in which any property of the debtor may be found is ordered to seize such property and hold it until a hearing can be had on the matter in controversy.[40] The venue of such actions is the county wherein the defendant, or debts or property of the defendant, may be found.[41]

Such properties, including both real and personal property of every nature whatsoever, shall thereupon be subjected to seizure by the officer to whom the writ of attachment is directed. The closely parallel procedure of garnishment shall also be invoked on the officer's own initiative if he shall find any persons who are indebted to the defendant, the primary purpose throughout being to provide the plaintiff with sufficient property to satisfy any judgment which he may be awarded in the main action.[42] At the same time that the property is attached the officer shall

---

[34] Houston v. Belcher, 20 Miss. 514 (1849); Ford v. Marshall, 10 Miss. 260 (1844); Tyson v. Hamer, 3 Miss. 609 (1837).

[35] Baird v. Georgia Pac. Ry., 12 So. 547 (Miss. 1893).

[36] Miss. Code § 2681 (1942).

[37] Clanton v. Laird, 20 Miss. 568 (1849); Grand Gulf R.R. & Banking Co. v. Conger, 17 Miss. 505 (1848); Wallis v. Wallace, 7 Miss. 254 (1842).

[38] Fitzpatrick v. Flanagan, *supra* note 27.

[39] Boisseau v. Kahn, 62 Miss. 757 (1885).

[40] The extent of such actual taking by the officer is summarized in the case of *Ex parte* Fuller, 99 Fla. 1165, 128 So. 483 (1930), as follows: "The general rule seems to be that in order to constitute a sufficient levy of an attachment on personal property, it is ordinarily necessary that the officer shall take the property into his control or custody, actual or constructive, or shall do such an act as would, except for the protection of the writ, subject him to an action for trespass."

[41] Miss. Code § 2683 (1942).

[42] *Id.* § 2686.

issue a summons to the defendant requiring him to appear and answer the action.[43]

When the defendant in a writ of attachment cannot be served personally with process, the procedure resorted to is process by publication. Such process is had by publishing notice for three weeks in a newspaper in the county where the suit is pending. Such publication may be made before or after the return term of the court. It should be particularly noted that in cases involving non-resident defendants an affidavit must be filed by the creditor, his agent or attorney, showing the post office address of the defendant or that diligent inquiry fails to reveal such address.[44]

In an interesting "battle of writs" the statutory procedure for recovery of the attached property by the defendant is the writ of replevin, which may be resorted to in the usual manner at any time before final judgment.[45] An alternate means of restoring his property may be taken advantage of by the debtor under Section 2704, wherein it is provided that at any time before the writ of attachment is returned by the officer executing it, the defendant can retrieve his property by posting bond with sufficient sureties in twice the amount claimed by the plaintiff. This privilege is also available, subject to the discretion of the serving officer, at any time before final judgment.[46] A similar provision is found in Section 2706 for debts not due at the time of the attachment. Upon the failure of the executing officer to exact sufficient bond on such sureties in any of the above instances, he shall be subject to the same liability as if he were a co-surety on the bond. Where the court finds that such a bond is insufficient, it may order the property seized once again, in which case it shall be dealt with as if it were the original taking.[47]

There are a number of factors which may enter to complicate and confuse the matter of the handling of the property after it has been properly and lawfully attached. Foremost among these is the consideration of the interests which third parties may have or claim to have in such property. In these cases Section 2709 gives such third persons the usual statutory rights set up elsewhere in the Code[48] to have a subsequent determination of their interests, but such determination may not be had until after the plaintiff has obtained a judgment in the attachment suit. In such instances the rights of the third party claimants shall not be prejudiced in any way by the prior action, and the burden of proof rests with the

---

[43] *Id.* § 2687.
[44] *Id.* §§ 2693, 2695.
[45] *Id.* § 2697.
[46] *Id.* § 2704.
[47] *Id.* § 2708.
[48] *Id.* §§ 1021-1032.

plaintiff in the attachment action to establish his right to the property as against the third party.[49]

Property which is "in danger of immediate waste and decay" and property which is not susceptible of being held indefinitely, such as livestock or stocks of goods, can be sold, provided the owner does not replevy same before sale. If the attachment hearing shall commence within fifteen days of the levy, however, only the property in danger of immediate waste and decay may be sold.[50] Any type of personal property can be sold on appropriate order of the court if, after ten days from the levy thereon, the defendant or claimant does not replevy it. In such case timely notice must be given to all parties to the suit.[51]

As for the pleadings on the issue giving rise to the attachment proceeding, the declaration must be filed on or before the return day of the attachment or before an order of dismissal is taken. The defendant then must plead as in other cases, although where he has entered a plea in abatement, he shall not answer otherwise until the plea in abatement has been disposed of.[52] A plea in abatement having been entered, the issue shall be heard and determined by a jury, who shall assess damages against the plaintiff if they find for the defendant.[53] The defendant must stipulate at the time of filing his plea in abatement what damages he will seek.[54] If the plea in abatement be determined in favor of the plaintiff, the defendant shall then proceed to plead to the merits.[55] However, the defendant waives his plea in abatement if he pleads to the merits before the disposition of the former plea.[56] Should the plaintiff dismiss his attachment, the defendant may have a jury assess the damages which he may have sustained by virtue of the suit.[57] The damages which the defendant may have procured as a result of the improper attachment of his property may then be applied against any judgment obtained against him in the trial on the merits.[58]

A default judgment shall be entered against the defendant unless he shall appear and plead. Against one who has not been personally served

---

[49] Third Nat. Bank of St. Louis v. Reeves Grocery Co., 113 Miss. 35, 73 So. 866 (1917).

[50] Miss. Code § 2710 (1942).

[51] *Id.* § 2711.

[52] *Id.* § 2713. Although pleas in circuit court were abolished by the Civil Practice Act of 1948, such pleas as pleas in abatement in attachment proceedings and other special actions continue to be used. See Griffith, *The New Mississippi Civil Practice Act,* 20 Miss. L.J. 26 (1948).

[53] Miss. Code § 2716 (1942).

[54] *Id.* § 2717.

[55] *Id.* § 2719.

[56] Lewenthall v. Miss. Mills, 55 Miss. 101 (1877).

[57] Miss. Code § 2720 (1942).

[58] *Id.* § 2722.

with process in this state, however, the judgment shall be effective only as against the attached property.[59]

Third party creditors may protect their interests in property by intervening in an attachment suit and showing that the attachment has been sued out by fraud or collusion. Here again the intervening creditor must post bond in order that the plaintiff may be protected from frivolous interveners.[60]

Attachment in Chancery

The second and parallel avenue of procedure available in attachment is attachment in chancery. Such an action, it should be emphasized, is entirely separate from and independent of the law action.[61] In addition to the grounds covered by the circuit court statute, damages arising *ex delicto* are included under the chancery procedure, as well, of course, as claims of an equitable origin. Thus, the chancery remedy is broader than the law action. The remedy may be used against:

> ". . . any non-resident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor."[62]

It is further provided in the same section that the court shall give a decree *in personam* against such debtors if they have entered an appearance or have been personally served. It should be particularly noted in this connection that a defendant may appear in an attachment case solely for the purpose of objecting to the attachment without subjecting himself to the jurisdiction of the court otherwise.[63] Such a special appearance comes within the exception recognized in Mississippi permitting objections to the jurisdiction.[64]

Some difficulty has been encountered under this statute in ascertaining who may bring the action and against whom it may be brought. It has been established that non-resident complainants may avail themselves of it as if they were residents.[65] In the case of foreign corporations, even where they are subject to service of process so as to be liable to personal

---

[59] *Id.* § 2714. See Tabler v. Mitchell, 62 Miss. (1884).
[60] Miss. Code § 2725 (1942).
[61] Craig v. Gaddis, 171 Miss. 379, 157 So. 684 (1934).
[62] Miss. Code § 2729 (1942).
[63] First Nat. Bank v. Miss. Cottonseed Prod., 171 Miss. 282, 157 So. 349 (1934); Ala. Power Co. v. Jackson, 181 Miss. 691, 179 So. 571 (1938).
[64] Griffith, Miss. Chancery Practice §§ 249, 255 (2d ed. 1950).
[65] Regina Flour Mills v. Lehman, 117 Miss. 575, 78 So. 515 (1918).

judgment and where they have property within this state subject to execution, the element of non-residence is still sufficient to bring them within the attachment statute.[66] One thing stands out clearly, though, unless there is land involved, there must exist a resident co-defendant or one served personally within this state.[67]

The salient points to be remembered in conection with a chancery attachment action against a non-resident are that there must be a presently existing indebtedness, either legal or equitable, and that there must be personal property in the hands of a resident, who must be made a party defendant, or there must be realty in this state belonging to the non-resident debtor.[68] It is insufficient that he have personalty in this state if it be not in the hands of someone on whom the writ can be served.[69] In the case of land, the writ of attachment can be levied just as such writs are levied in the law action,[70] but where personal property is involved, it must be attached through a writ of sequestration.[71]

It is necessary to summon the non-resident, absent or absconding debtor, as in other cases, by the publication of summons. Such debtor may appear and, upon the giving of adequate security as required by the court, may discharge the lien against the attached property.[72] Upon the rendering of a decree in the absence of the debtor, the complainant shall be required to put up security for the property in the event it may be restored to the debtor upon the latter's appearance in two years, during which period the debtor has the right to come in and answer the bill. If the complainant does not give such security, the property will remain in the hands of a receiver to abide the orders of the court until the expiration of the two-year period.[73] Because of this lack of finality in chancery attachment proceedings, the remedy is usually brought under the law action in those cases where the law action will lie.

Conclusion

Finally it should be observed that, properly applied, the writ of attachment, both at law and in chancery, can be made to serve highly desirable and useful ends. It can fill the role of an insurance policy in

---

[66] Clark v. L & N R.R., *supra* note 5; Aetna Ins. Co. v. Robertson, 126 Miss. 387, 88 So. 883 (1921); So. Motor Express Co. v. Magee Truck Lines, 181 Miss. 223, 177 So. 653 (1937).

[67] See Griffith, *op. cit. supra* note 64, § 484; Gulf Refining Co. v. Mauney, 191 Miss. 526, 3 So. 2d 844 (1941).

[68] York v. York, 187 Miss. 465, 193 So. 330 (1940).

[69] Advance Lbr. Co. v. Laurel Nat. Bank, 86 Miss. 419, 38 So. 313 (1905).

[70] Miss. Code § 2731 (1942).

[71] *Id.* § 2732. See note 69 *supra.*

[72] Miss. Code § 2733 (1942).

[73] *Id.* § 2734.

the collection of debts which might otherwise defeat collection. It frequently represents the only means whereby a defaulting debtor can be made to account to his creditors. In the last analysis, however, it must be admitted that attachment is a harsh remedy against those at whom it is directed, and conversely can prove an uneasy remedy in the hands of those for whose benefit it is used. For by virtue of its extraordinary character in subjecting the property of another to legal seizure prior to the adjudication of any rights in court, it cannot be invoked frivolously or uncertainly. It can prove a boomerang in the hands of the careless, for the invoker is answerable in damages for any abuses which may result in its improper application. A careful study of the statutes should be able to provide, however, a sufficient guide for a safe and secure voyage through the shoal-lined waters of the attachment process in practically every case.

WRITS OF CAPIAS

*R. Gordon Grantham**

Capias, interpreted literally from the Latin, "That you take," is the general designation applied to a class of writs, the common characteristic of which is the requirement that the officer to whom the writ is directed take the body of the defendant into custody.[1] They are sometimes referred to as "body writs." Although the term has been held to be sufficiently broad to include warrants of arrest in criminal cases,[2] and is specifically designated as the process on an indictment in a Mississippi criminal statute,[3] it is customarily used to refer to those writs issued in civil cases for the purpose of taking and holding the defendant to insure his presence before the court or to enforce satisfaction of a claim against him. Blackstone's treatment of the subject of warrants for arrest in criminal cases is entirely separate from the subject of the capias writs.[4]

There were a number of these writs in use under the common law and early English statutes, which were designated by the Latin phrase indicating the purpose for which they were issued.[5] The limitations of this article do not permit an extended discussion of each of these writs, for the most part discarded in modern practices, but the following list of the most generally used writs and a brief description of each will be of interest:

Capias ad audiendum judicium. Issued to bring a defendant found guilty in a criminal prosecution, but at large, before the court to receive judgment.

Capias ad computandum. Issued to compel a defendant to appear and render his account upon having failed to do so on order.

Capias ad faciendum. Issued to take the body of the defendant, after judgment, in execution.

Capias ad respondendum. Issued for the arrest of the defendant, either as original process in certain cases or as mesne process in others when he had failed to obey a prior notice or summons, to present him before the court on a certain day to answer the plaintiff's action. This

---

*B.A., Millsaps College; LL.B., University of Mississippi. Member firm of Brunini, Everett, Grantham & Quin, Jackson, Mississippi.

[1]9 C.J., CAPIAS, p. 1267; 12 C.J., CAPIAS, p. 1119; BLACK'S LAW DICTIONARY (3d ed. 1933); LAW DICTIONARY (Baldwin's students ed. 1934); BOUVIER'S LAW DICTIONARY; BALLANTINE'S LAW DICTIONARY.

[2]Miller County v. Magee, 177 Ark. 752, 7 S.W.2d 973, 975, (1928).

[3]MISS. CODE § 2461 (1942). "The process for arrest on an indictment shall be a capias. . . ."

[4]See 4 BL., COMM. 289 *et seq.*

[5]See 12 C.J.S., CAPIAS, pp. 1119-1121.

appears to be one of the most important and generally used of the capias writs, and is one of the few in present use in some jurisdictions.

Capias ad satisfaciendum. A writ of execution issued on the record of judgment, requiring defendant to be taken and held to appear in court on the return day to satisfy the judgment.

Capias pro fine. Issued for the collection of a fine on behalf of the commonwealth for the benefit of the governmental agency or party entitled thereto. The issuance of this writ by a Board of Supervisors for collection of fines imposed by it is authorized by one Mississippi statute and the existence of this writ is recognized in another.[6]

Although there are several other writs of this class, they appear to be of a highly technical character and to have little, if any, historical connection with present day practice, for which reason they are omitted here.

Early History

The early use of capias writs is only briefly covered by general treatises on the subject of arrests in civil actions and there seems to be considerable obscurity concerning the origin and development of the capias writs under the early common law and statutes. As is to be expected, the most comprehensive treatment of the subject is by Blackstone in his chapter on Process.[7] At first, a capias was not issued as an original process for the defendant's arrest, but only as a mesne process after the defendant had failed or refused to appear in response to a summons served upon him or posted at his house or land, except in cases of injury accompanied by force, in which, to punish the breach of peace and prevent its disturbance in the future, a writ of attachment was issued and if the defendant did not appear or had no substance a *capias de respondendum* followed, subjecting his body to imprisonment. Because "this immunity of the defendant's person, in case of peaceable though fraudulent injuries" produced "great contempt of the law in indigent wrongdoers,"[8] successive statutes permitted the use of a capias as original process in actions of account,[9] debt and detinue,[10] and eventually in all actions on the case.[11]

There followed a long period during which a defendant was liable in all cases to be arrested in the first instance on a capias without any

---

[6] Miss. Code § § 2882 and 1422 (1942).
[7] 3 Bl. Comm. 279 *et seq.*
[8] *Id.* at 254.
[9] 52 Hen. 3, c. 23; 13 Edw. I, c. 11.
[10] 25 Edw. 3, c. 17.
[11] 19 Hen. 7, c. 9.

necessity for the plaintiff to first prove, or even specifically allege, the justice of the demand, the nature of the injury, or the extent of the loss sustained. But, in turn, these abuses started the pendulum in the opposite direction, and restrictions were placed on this almost uncontrolled power of arrest in civil cases by requiring the plaintiff to make affidavit that the cause of action amounted to ten pounds or more and showing that the demand was certain and specific.[12]

The only other of the capias writs which seem to have been adopted to general, though limited, use in this country is *capias ad satisfaciendum,* an execution writ. It was the first of five kinds of executions available in actions where money only was recovered as a debt or damages, and its original use at common law was to imprison the body of the debtor until satisfaction of the debt, costs and damages.[13] Originally this writ lay at common law only in trespass *vi et armis,* but under the statutes enacted from time to time making *capias ad respondendum* the original or the mesne process in certain other cases, it became the rule that the *capias ad satisfaciendum* would lie in all cases where a *capias ad respondendum* might be used to bring the defendant before the court.[14] The development of *capias ad satisfaciendum,* therefore, appears to parallel that of *capias ad respondendum.*

The use of the capias writs in the United States is almost completely governed by statutes or by constitutional provisions either abolishing imprisonment for debt or restricting arrests in civil actions to certain special types of cases, such as those involving fraud, breach of promise, assault and battery, etc.[15] An attempt to review the constitutions, statutes and decisions of the various states on the subject is not within the scope of this article.

Capias Writs in Mississippi

The early statutes of the Mississippi Territory governing the use of capias writs seem to have followed rather closely the practice in effect in England at the time. The arrest and holding of a defendant to bail was authorized in chancery cases if either of the territorial judges should give a special order to that effect.[16]

A defendant could be arrested and "held to bail of course" for the amount demanded in any action on "any specialty, bill or note in writing

[12]For brief historical summaries of the use of the writ of *capias ad respondendum,* see Sobolewski v. German, 32 Del. 540, 127 Atl. 49 (1924); Clark v. Walcott, 125 Mich. 449, 84 N.W. 629 (1900).

[13]3 Bl. Comm. *414.

[14]23 C.J., Executions, § 1104.

[15]4 Am. Jur., Arrest § 62 *et seq.;* 11 Am. Jur., Const. Law § 327.

[16]Stat. Miss. Ter., Part V, c. 2, § 47 (1807).

signed by the defendant, or on the judgment of any court, foreign or domestic," and also in "all actions founded on verbal contracts and assumpsits in law," provided the plaintiff or some credible person gave affidavit specifically setting forth the amount due or the damages sustained and the amount was endorsed on the writ by the clerk. But a defendant was not to be arrested and held to bail where the action was for damages which could not be definitely ascertained, "except by order of the court, or some one of the judges or justices thereof, upon sufficient cause shown by affidavit," in which case the court order and the amount of bail to be required was endorsed on the writ.[17]

The condition of the bail was that the defendant would satisfy any judgment obtained against him, or would surrender to the court, or that the bail (surety) would do it for him.[18] The bail at any time before judgment against himself could arrest the defendant and deliver him to the sheriff, thereby being discharged from his obligation.[19]

Justices of the peace were authorized, on an action for debt or demand not exceeding twenty dollars, "to issue his warrant in the nature of a summons, capias or attachment (as the case may require). . . ."[20]

All persons recovering debt, damages or costs by judgment of any court of record in the territory could "at their election, prosecute writs of fieri facias, elegit and capias ad satisfaciendum" within one year.[21] The debtor could receive his discharge from custody by surrendering to the sheriff "slaves or personal property" to the value of the debt and costs.[22]

However, "for the relief of insolvent debtors, who shall be taken in execution, and to prevent the long imprisonment of unfortunate people which can be of no benefit, but rather a disadvantage to their creditors," it was provided that a debtor could be brought before a judge or court at any time on ten days notice to creditors, and by giving under oath a schedule of his entire estate he could obtain a discharge from custody.[23]

By successive constitutional and legislative enactments following the admission of Mississippi into the Union the use of the capias writs in civil actions was restricted and, in time, virtually abolished. The first constitution, adopted in 1817, provided that "the person of a debtor,

---

[17] *Id.*, Part V, c. 6, § 1.
[18] *Id.* § 6.
[19] *Id.* § 5.
[20] *Id.*, c. 8, § 1.
[21] *Id.*, c. 12, § 1.
[22] *Id.* § 18.
[23] *Id.* § 23.

where there is not strong presumption of fraud, shall not be detained in prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law."[24] This same provision was brought forward in the constitution adopted in 1832.[25]

In 1824 a statute was enacted granting to an imprisoned debtor the right to require the sheriff to take him before a justice of the county court, and upon his delivering and subscribing on oath before the justice a full schedule of his property, except that exempt, he was discharged. In the alternative, the debtor could give bond with good security that he would file within two months a schedule of his property.[26] An act of 1839 provided that no person should be arrested or imprisoned for debt except in certain specified cases, all similar in that they involved fraud on his creditors by the debtor. In each the plaintiff was required to make affidavit of the facts constituting the fraud and to give bond in double the amount claimed to secure the payment of damages if the capias was issued without good cause.[27] The following year a statute was enacted which provided that thenceforth, "no person whatsoever" should be imprisoned for debt, under any pretence, "unless upon issue submitted to a jury, and they declare there has been fraud on the part of the debtor, in concealing his property."[28] The passage of this act was held to discharge a bondsman who previous to the enactment had given bail to effect the release of a debtor in custody under a *capias ad satisfaciendum*.[29] The next statute was brief and direct: "No arrest or imprisonment for debt shall be allowed in any civil action in this state."[30] This approached closely the constitutional prohibition of imprisonment for debt adopted in 1869[31] and readopted in the present constitution,[32] reading: "There shall be no imprisonment for debt."

This prohibition has been held not to apply to fines, forfeitures and costs imposed in criminal cases, these being part of the penalties which may be inflicted by the court,[33] or to an action to enforce payment of a dog tax.[34] A statute authorizing the court to require a defendant, after

---

[24]Miss. Const. (1817) Art. I, § 18.
[25]Miss. Const. (1832) Art. I, § 18.
[26]Hutchinson's Code (1948), c. 38, art. 5, p. 551.
[27]*Id.*, art. 9, p. 552, *et seq.*
[28]*Id.*, art. 10, p. 555.
[29]Brown v. Dillahunty, 12 Miss. 713 (1841).
[30]Miss. Rev. Code (1857), art. 59, § 7, p. 488.
[31]Miss. Const. (1869) Art. I, § 11.
[32]Miss. Const. (1890) Art. 3, § 30.
[33]*Ex parte* Meyer, 57 Miss. 85 (1879) ("We think the debts the framers had in view were those springing from the contracts of the party . . . or the liabilities which the law imposes upon him for his tortious acts to another, and are wholly disconnected from the penalties imposed by violations of the criminal law."); *Ex parte* Diggs, 86 Miss. 597, 38 So. 730 (1905); *Ex parte* McGinnis, 98 Miss. 773, 54 So. 260 (1911).
[34]State v. Widman, 112 Miss. 1, 72 So. 782 (1916) ("The Constitution has reference to debts founded on contract. It has no application to taxes.").

judgment against him in a bastardy case, to give bond to secure support for the child and to commit him to jail in default thereof does not violate the constitutional prohibition.[35] A husband's obligation to support his wife is a public duty and not a debt within the prohibition,[36] but debtors of a husband, ordered to pay to his wife the money due the husband to satisfy an award of alimony could not be held in contempt for failure to make the payment, this being equivalent to imprisonment for debt.[37]

It is stated that under the weight of authority, statutory or constitutional prohibitions against imprisonment for debt apply only to actions on contract and not to tort actions, but there is a minority view to the contrary.[38] This question does not appear to have been decided in any reported case in Mississippi.[39]

From the absence of decisions on the subject in Mississippi since the enactment of the absolute prohibition of imprisonment for debt, first appearing in the Code of 1857, it appears that for all practical purposes the capias writs disappeared from the jurisprudence and practice of this state, and now hold little, except historical, interest for the members of the Mississippi Bar.

---

[35]*Ex parte* Bridgforth, 77 Miss. 418, 27 So. 622 (1900).
[36]Fanchier v. Gammill, 155 Miss. 316, 124 So. 365 (1929).
[37]Carper v. Carper, 94 Miss. 598, 48 So. 186 (1909).
[38]4 AM. JUR., ARREST § 56; 11 AM. JUR., CONST. LAW § 327, at 1128.
[39]The summary of State v. Widman, *supra* note 34, which appears in the Miss. Digest reflects that case to hold that the prohibition "applies only to contracts, express or implied, and does not extend to actions for tort." But reference to the report itself plainly reveals the error whereby "tort" was substituted for "taxes."

CERTIORARI

*Edgar J. Stephens, Jr.**

Origin

The common law writ of certiorari was an original writ issuing out of chancery or the king's bench, directed in the king's name to the judges or officers of an inferior court, commanding them to return the record of a cause pending before them, so that the party might have a review of the proceedings.[1] It was by this writ, therefore, that the court of king's bench exercised superintendence over the due observance of their limitations by inferior courts, checked the usurpation of jurisdiction and maintained the supremacy of the royal courts. Having a superintending power over all inferior courts of criminal jurisdiction in criminal matters, the writ was awarded as a matter of course, it being the prerogative of the king to be heard in any of his courts in the kingdom.

Development in Mississippi

It was an early practice in Mississippi to award a writ of certiorari upon the simple suggestion of either party that there was error in the record of the proceedings below, a practice neither warranted by the unquestioned law in England or the usages of its courts. In 1822 it was determined that the writ was not a writ of right but was to be granted only upon showing that the rights of an individual had been infringed by the acts of persons clothed with authority to act who exercised that authority illegally.[2]

Liberality in use of the writ was still in evidence in 1830 when, by statute,[3] all cases decided by any justice of the peace upon good cause shown by petition, supported by affidavit, could be removed within twelve months by writ of certiorari into any court having jurisdiction thereof where the cause would be tried de novo, on its merits. With the creation in 1833 of county boards of police which were vested with all powers then held by the county courts, including that of levying taxes, the right of appeal by certiorari from judgments of the board was provided.[4] A separate Superior Court of Chancery, established in 1833 by authority of the Revised Constitution of the State of Mississippi of 1832,[5] was given general but not exclusive equitable jurisdiction and anyone against whom a bill of chancery was filed in circuit court, which also enjoyed original

*Attorney at Law, New Albany, Miss.

[1] 1 Bacon's Abr. 559; Duggen v. McGruder, 1 Miss. 112 (1822).
[2] Duggen v. McGruder, *supra* note 1.
[3] Hutchinson's Code, c. 50, art. 9 (1848).
[4] *Id.* at c. 51, art 5.
[5] *Id.* at c. 54, art 10.

and concurrent equitable jurisdiction with the superior court, could transfer the cause to the superior court by certiorari upon making affidavit that a fair trial of said cause could not be had in circiut court.[6]

The extent of authority under the writ had been limited by 1857 when by statute[7] it was provided that in any cause removed to it by certiorari from the justice of peace court, the circuit court was "confined to the examination of questions of law arising or appearing on the face of the record and proceedings." This language remains in our present statute.[8] In 1871 the time in which a cause might be removed by certiorari was reduced to six months.[9]

Nature and Office of the Writ

The writ of certiorari is used for two purposes: first, as an appellate proceeding for the re-examination of some action of an inferior tribunal; second, as an auxiliary process to enable the court to obtain further information in respect to some matter already before it for adjudication.[10]

Certiorari being a statutory remedy in Mississippi, its scope has been limited and defined.[11] Though appellate in nature, certiorari does not replace or usurp the power of appeal.[12] All cases decided by a justice of the peace may, through proper procedure, be removed to the circuit court, but the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings. In like manner, the judgments of all tribunals inferior to the circuit court may be reviewed by it, whether an appeal be provided by law from the judgment sought to be reviewed or not.[13] Certiorari is distinguished, therefore, from appeal in that the former brings up the case on record and by the latter the case is brought up on the merits. An attempt by the legislature to provide for trial de novo by the chancery court of decisions or orders of the insurance commission brought to the chancery court by certiorari[14] was held unconstitutional.[15]

Certiorari may be distinguished from other remedial writs. It differs from a writ of error in that the latter is a writ of right; certiorari is

---

[6] *Id.* at c. 54, art. 10, § 7.
[7] Miss. Code, c. 58, art. 28 (1857).
[8] Miss. Code § 1206 (1942).
[9] Miss. Code § 1336 (1871).
[10] Caruthers v. Panola Co., 205 Miss. 403, 38 So. 2d 902 (1949); Schwartz v. McKay, 184 Miss. 422, 185 So. 200 (1938); Shapleigh Hardware Co. v. Brumfield, 159 Miss. 175, 130 So. 98 (1930).
[11] Miss. Code §§ 1206, 1207, 1208, 1609, 1616, 1657, 1830 (1942).
[12] Federal Credit Co. v. Zepernick Grocery Co., 153 Miss. 489, 120 So. 173 (1928).
[13] Miss. Code § 1207 (1942); Holberg v. Town of Macon, 55 Miss. 112 (1877).
[14] Miss. Code § 5829 (1942).
[15] Miss. Ins. Commission v. Ins. Co. of N. America, 203 Miss. 533, 36 So.2d 165 (1948).

discretionary.[16] A writ of error lies where the proceedings are according to the course of the common law; certiorari issues where the proceedings are of different character. Ordinarily, certiorari cannot be used as a substitute for a writ of error. Certiorari differs from habeas corpus in that a writ of habeas corpus reaches the body and also jurisdictional matters, but it does not reach the record. Certiorari reaches the record, but not the body. Certiorari differs from mandamus in that mandamus compels an unperformed ministerial duty; certiorari reviews a performed judicial duty.[17]

The writ of certiorari is not one of right, but rather is one which is discretionary with the court, in order to promote the ends of justice as effectively as possible.[18] The writ will not issue upon the mere suggestion of either party that there is error in the record of the proceedings below. Special cause must be shown to the court to which application is made in order for the writ to issue. The particular grounds upon which the showing must be made rest with the court, in the exercise of sound discretion.[19] After dismissal of one certiorari on the suggestion of the applicant, he cannot have another.[20]

Certiorari as an Appellate Proceeding

Proceedings Reviewable. At common law and under the practice in Mississippi, the write of certiorari will lie to review only those acts which are judicial or quasi-judicial in their nature.[21] Certiorari lies to the circuit court to review assesments of the board of railroad assessors and to test the legality thereof.[22] Since the order of a board of supervisors directing that a road be laid out and condemning land was a "final judgment," it was reviewable by certiorari,[23] as was an order of a board of supervisors providing for an election on abolition of the sale of beer and light wine.[24]

It does not lie to review or annul any judgment or proceeding which is legislative, executive, or ministerial rather than judicial.[25] The Supreme Court, therefore, would not review judicially the action of the presi-

---

[16] See note 2 *supra.*
[17] 10 Am. Jur., Certiorari § 4.
[18] Miss. Code § 1657 (1942).
[19] See note 2 *supra.*
[20] Williams v. Williams, 34 Miss. 143 (1857).
[21] Bd. of Supervisors of Marshall County v. Stephenson, 130 So. 684 (1930), *judgment reversed on suggestion of error,* 160 Miss. 372, 134 So. 142 (1931).
[22] I.C. Ry. v. Miller, 141 Miss. 223, 106 So. 636 (1926).
[23] Ferguson v. Seward, 146 Miss. 613, 111 So. 596 (1927).
[24] Mohundro v. Tippah County, 174 Miss. 512, 165 So. 124 (1936).
[25] Anderson v. Franklin County School Bd., 164 Miss. 646, 146 So. 134 (1933); Bd. of Supervisors of Forrest County v. Melton, 123 Miss. 615, 86 So. 367 (1920); Yalobusha County v. Carbey, 11 Miss. 529 (1844).

dent of a board of supervisors and clerk of the chancery court in refusing to approve the official bond of a member of the board, even though the president and clerk failed to interpret properly the statutes relating to such bonds.[26] The writ was held not to lie to review an order of the railroad commission fixing telephone rates,[27] or intrastate freight rates,[28] the determination of such rates being a legislative and not a judicial or quasi-judicial function.

Proceedings and Determination. The power to issue a writ of certiorari in a proper case is expressly conferred by statutory provisions which are, in some instances, merely an affirmance of common law powers. In order to remove cases tried by a justice of the peace and judgments renddered by inferior tribunals[29] to the circuit court, a petition showing good cause, supported by affidavit, must be filed in the circuit court by one of the parties to the suit, the party giving bond, with security, to be approved by the judge or clerk of the circuit court as in cases of appeal from justices of the peace.[30] Only a party to the proceeding sought to be reviewed, or a person directly affected by it, can prosecute the writ of certiorari. If a person not a party to the proceeding seeks to use the writ, he must show that the decision sought to be reviewed is directed against him or his property, in the sense that the enforcement of the decision would involve special, immediate and direct injury to his interests.[31]

The petition for the writ should set forth all facts essential to establish the right of the applicant thereto; and an order therefor can no more be made where a part of the essential facts must be supplied by mere inferences which do not necessarily follow from the other facts stated than can any other order be made by a court upon such an insufficient foundation.[32]

The circuit judge has the sole power to determine the sufficiency of the petition[33] and he may require that satisfactory proof be made that the defect exists in a material part and that it can be corrected.[34] Though a

---

[26] Fairley v. Ladnier, 190 Miss. 514, 200 So. 724 (1941).

[27] Cumberland Telephone & Telegraph Co. v. State, 135 Miss. 835, 86 So. 369 (1920).

[28] I.C. Ry. v. Miss. R.R. Commission, 143 Miss. 805, 109 So. 868 (1926).

[29] "Inferior tribunals" also include corporate authorities of municipal corporations (Holberg v. Town of Macon, note 13 *supra*), railroad commission (Gulf & S.I. Ry. v. Adams, 85 Miss. 772, 38 So. 348 (1904)), insurance commission (Caruthers v. Panola Co., note 10 *supra*) and secretary of state (Power v. Robertson, 130 Miss. 188, 93 So. 769 (1922)).

[30] Miss. Code §§ 1206, 1207, (1942).

[31] 10Am. Jur., Certiorari § 17; Dickson v. Town of Centreville, 157 Miss. 490, 128 So. 332 (1930).

[32] Hamilton v. Long, 181 Miss. 627, 180 So. 615 (1938); Planters Lbr. Co. v. Griffin Chapel M.E. Church, 157 Miss. 714, 124 So. 479 (1929).

[33] Patrick v. McKernon, 6 Miss. 578 (1841); Loomis v. Commercial Bank, 5 Miss. 660 (1840).

[34] Patrick v. McKernon, *supra* note 33.

writ of certiorari be issued on a petition which fails to show good cause, the writ, though improperly issued, is not void, the judge not being without jurisdiction to issue such a writ under Section 1657, Mississippi Code of 1942.[35]

The clerk of the circuit court, on the issuance of a certiorari, shall issue a summons for the party to be affected thereby and, in case of non-residents, may make publication for them as in other cases.[36] It is too late to dismiss a certiorari after defendant has appeared and pleaded.[37]

The officer or court to whom the writ is addressed is required to comply with its order by returning and certifying the record of the proceedings of the inferior tribunal, or whatever notes or entries have been made by it in the nature of a record.[38] If the case is one of which the court to which it is returned is without jurisdiction, it should be dismissed on motion.[39] The court to which return is made is confined to examination of questions of law arising or appearing on the face of the record[40] and proceedings and cannot consider a transcript of evidence, or other matters not part of the record proper, though it be returned with the record.[41] The petition for certiorari is only to enable the judge to determine whether the writ should issue and when the cause is removed to the circuit court it is to be tried on the record and not on the allegations of the petition.[42] While the court can set aside an order or judgment of an inferior tribunal for error apparent on record but not specifically assigned in the petition for writ of certiorari,[43] it is the duty of the party obtaining the writ to appear in circuit court at the return of the certiorari and point out the errors, if any exist; and if he fails to do so, and the circuit court affirms the judgment, he cannot be allowed in the supreme court to avail himself of his own negligence in allowing the affirmance by default.[44] On the hearing in the reviewing court, evidence may be presented by petitioner for the

---

[35] Hamilton v. Long, *supra* note 32.

[36] Citizens' Bank v. Ratliff & Beadshaw, 142 Miss. 866, 108 So. 146 (1926); Copeland v. Pate, 7 Miss. 275 (1842).

[37] Fitzpatrick v. Ray, 12 Miss. 645 (1845).

[38] See note 26 *supra;* Hamilton v. Long, *supra* note 32.

[39] See note 12 *supra;* Bd. of Supervisors of Forrest County v. Melton, *supra* note 25.

[40] Viator v. State Tax Commission, 193 Miss. 255, 5 So.2d 487 (1942); *In Re* Validation of Lincoln County Funding Bonds, 187 Miss. 392, 193 So. 26 (1940); Bd. of Supervisors of Forrest County v. Melton, *supra* note 25; Hamilton v. Long, *supra* note 32; Federal Credit Co. v. Rogers, 166 Miss. 559, 148 So. 353 (1933); Simpson v. Phillips, 164 Miss. 256, 141 So. 897 (1932).

[41] Hamilton v. Long, *supra* note 32; Yazoo & M. Valley Ry. v. Miss. R.R. Commission, 169 Miss. 131, 152 So. 649 (1934).

[42] Board of Supervisors of Forrest County v. Melton, *supra* note 25; Dickson v. Town of Centreville, *supra* note 31.

[43] Board of Supervisors of Calhoun County v. Young, 156 Miss. 644, 126 So. 469 (1930), followed in Crowson v. Young, 126 So. 470 (1930).

[44] O'Leary v. Bolton, 50 Miss. 172 (1874).

writ to make manifest the error of law committed by the inferior tribunal.[45]

In case of an affirmance by the reviewing court of the judgment of the justice or other inferior tribunal, the same judgment shall be given as on appeals.[46] When on reversal it is apparent from the record and proceedings alone what final judgment should have been entered, the circuit court should enter that judgment,[47] which is a "final judgment."[48] If the judgment which the justice should have entered is not apparent, the case may be tried anew on its merits under the same procedure as that in cases tried de novo in ordinary appeals to the circuit court.[49]

As an Auxiliary Process

Authority and Grounds. Authority to use certiorari as an auxiliary process has been granted by statute to county judges[50] and the judges of the Supreme and circuit courts and chancellors of the chancery courts,[51] being an exercise of original and not appellate jurisdiction.[52] This office of certiorari is to require the clerk of the court from which an appeal is taken to send up the record in the case appealed, or, in case the record already sent up is defective, to send up a more complete record, in order that the entire proceedings in the trial court may be reviewed.[53] Thus, where a writ of error is sued out on a judgment which is final in its character, before the end of the term at which it is rendered, and the record is alleged to be inconclusive because the judgment may have been reversed by the court which rendered it before the end of the term, a certiorari will be awarded for a transcript of such further proceedings as may have been had.[54] The writ will issue to require a clerk to prepare and send up a true and correct record, properly certified, where the original certificate was defective;[55] to require a trial court clerk to make corrections where he has erroneously omitted or copied parts of record on appeal;[56] and to send up a pleading and named exhibit, shown by the minutes of the court to have been filed in the court below, which are left out of the record

---

[45] Caruthers v. Panola County, *supra* note 10.
[46] Hamilton v. Long, *supra* note 32.
[47] Hattiesburg Trust & Banking Co. v. Hood, 97 Miss 340, 52 So. 790 (1910); Williams v. Williams, 117 Miss. 251, 78 So. 152 (1918); Evans v. Southern Ry., 74 Miss. 230, 21 So. 15 (1896).
[48] See note 22 *supra.*
[49] Bd. of Supervisors of Forrest County v. Melton, *supra* note 25.
[50] Miss. Code § 1609 (1942).
[51] *Id.* § 1657.
[52] Alexander v. Johnson, 165 Miss. 721, 138 So. 329 (1931); Redus v. Gamble, 85 Miss. 165, 37 So. 1010 (1904).
[53] Redmond v. Hilliard, 190 Miss. 839, 199 So. 83 (1940); Aluminum Cooking Utensil Co. v. Shivers, 149 Miss. 197, 115 So. 345 (1928).
[54] Byrne, Vance & Co. v. Jeffries, 38 Miss. 533 (1860).
[55] Davis v. Davis, 37 So.2d 735 (1948).
[56] Brown v. Sutton, 158 Miss. 78, 121 So. 835 (1929).

on appeal.[57] If the clerk has failed to certify the record to the appellate court within the time prescribed by law, the writ may issue directing him to send up the record.[58] Certiorari will lie as well where an excess of matter in the record is suggested as where a diminution is alleged.[59]

Records of a court can be corrected or altered only by the court itself, and another court has no authority to make such corrections even though it has appellate jurisdiction over the court whose records are sought to be corrected.[60] The writ, therefore, will not issue to bring up an original paper introduced as evidence on trial unless and until made part of the record by the trial court.[61] Certiorari will not lie to require a clerk to complete the record for the Supreme Court by certifying copies of affidavits and search warrants introduced in evidence but not made part of the stenographer's transcript.[62] A writ of certiorari will not be issued by the Supreme Court to bring up a transcript of evidence, made by a stenographer pursuant to a void notice, from the court below.[63] Since the writ cannot properly issue to require the trial court clerk to certify something which does not actually exist in the records in his hands,[64] it will not lie to bring to the Supreme Court a certified copy of a named deed where it appeared that no deed had been introduced or even offered in evidence in the trial court,[65] or to require the inclusion in the record of the correct notes taken at the trial, the stenographer by mistake having transcribed the notes taken in another case, in the absence of a showing that the notes of the stenographer in the proper case are on file in the clerk's office, since the Supreme Court has no jurisdiction to compel the stenographer to file the notes.[66] The writ will not issue for the purpose of bringing up unnecessary matters, as where the record is sufficient for the purpose of review.[67]

---

[57] Yazoo & M. V. Ry. v. M. Levy & Sons, 141 Miss. 196, 106 So. 524 (1925); Kendrick v. Kyle, 28 So. 950 (1900).

[58] Lovett v. Harrison, 162 Miss. 814, 137 So. 471 (1931); Reynolds v. Wilkinson, 119 Miss. 590, 81 So. 278 (1918); Grand Court of Calanthe v. Baskin, 108 Miss. 752, 67 So. 210 (1915).

[59] Harris v. Planters Bank, 12 Miss. 701 (1842).

[60] Miss. Const. Art. VI, § 146 (1890); Brown v. Sutton, *supra* note 56; Rules of the Supreme Court of Mississippi, Rule 28.

[61] Sovereign Camp W.O.W. v. Duncan, 175 Miss. 724, 165 So. 546 (1936).

[62] Williams v. State, 178 Miss. 694, 172 So. 746 (1937).

[63] Dunn v. Green, 124 Miss. 602, 86 So. 852 (1921).

[64] See note 56 *supra*.

[65] Sims v. Crecink, 208 Miss. 873, 45 So.2d 737 (1950).

[66] Bankston v. City of Clarksdale, 134 Miss. 721, 99 So. 266 (1924).

[67] Sly v. Gilliland, 207 Miss. 356, 42 So.2d 393 (1949); Brown v. Sutton, *supra* note 56; Delta Chervolet Co. v. Waid, 211 Miss. 256, 51 So.2d 443 (1951).

PROCEEDINGS

The Mississippi Supreme Court, under its authority to prescribe its rules of procedure, has adopted two rules governing certiorari, set forth in the *Rules of the Supreme Court.*[68]

Section 1958, Mississippi Code of 1942, apparently is broad enough to permit the Supreme Court to act on its own motion in perfecting the record as to material matters where the defects or omissions are apparent in the record.

Application for certiorari, whether by motion or by petition, as is the usual practice in the circuit court, must point out the alleged defects or omissions, must set forth grounds for the relief asked and must show that the alleged omitted matters can be supplied and that they are necessary to a review. A writ to bring up a corrected record does not issue as a matter of right on mere suggestion of defects in the records, but the application must be supported by evidence of the defects alleged to exist.[69] Where the petition for certiorari is contested, the burden of proof rests upon the moving party.[70]

The use of certiorari as an auxiliary process is not as closely regulated by statute as is its use as an appellate proceeding, being properly granted "according to right and justice."[71] Since the earliest days of our legal system, courts have needed a method of check and control over inferior tribunals, and parties, as well as courts, have required assistance in perfecting records in order that cases might be properly reviewed. Certiorari fills a need that is supplied by no other writ and is a valuable adjunct to our practice, though its use has suffered somewhat from a lack of appreciation of its scope.

---

[68]"RULE 4. *Suggestion of Diminution of Record.* If a record be imperfect, diminution may be suggested by either party, and a writ of certiorari will be awarded, provided that if the filing of such a suggestion has been unnecessarily delayed to the prejudice of the opposite party, the writ will be awarded only upon such terms as the Court may impose, or it may be refused altogether."

. . . . . .

"RULE 31. *Remedial Writs.* No application for supersedeas, or any other writ or remedial process mentioned in . . . (Section 1657 Code 1942) except in cases of greatest emergency, shall ever be acted on, in any case pending in any court, by any member of the Supreme Court, ex parte; but every such application, except in emergency, shall be accompanied by a certificate of written notice served on the opposite party, or his counsel, or some of them, at least three days before the hearing; and all such applications will be acted upon only when both sides are represented at the hearing, or after such three days notice, duly certified as above."

[69]Yazoo & M. V. Ry. v. M. Levy & Sons, *supra* note 57.

[70] Wilkinson County v. Tillery, 122 Miss. 515, 84 So. 465 (1920).

[71] MISS. CODE § 1657 (1942).

WRITS OF ERROR CORAM NOBIS AND CORAM VOBIS

*Gibson B. Witherspoon**

Historical Origin

The ancient common law writs of coram nobis and coram vobis are species of writs of errors, though of somewhat peculiar nature. Under the usage of these writs, in appropriate cases, a judgment could be set aside by the court that entered it for material errors of fact, but not of law, affecting its validity and unknown to the court at the time judgment was originally entered.[1] Coram nobis means "before us ourselves" and is from the concept of being before the King or the King's or Queen's Bench and applies to writs of error directed to another branch of the same court, as from the full bench to the Court of Nisi Prius.[2] Coram vobis means "before you," or a writ of error directed by a court of review to the court which tried the case originally to correct an error of fact.[3] Both of these writs were devised, not by legislation, but by the judiciary to meet certain exigencies of justice, and are recognized in many states as existing common law remedies.[4]

American Concept

Coram nobis is issued by the court in which judgment assailed was rendered; coram vobis is issued by a supervising court to a lower court in which the judgment was rendered.[5] When these two writs were transplanted into our American judicial system the early English principles were followed.[6] The function of these writs of errors is to bring to the attention of the Court an error of fact not appearing on the face of the record, unknown to either the court or the party affected and which, if known to the court at the time of the trial, would have prevented the judgment which is challenged.[7] These writs differ from ordinary writs of error (which are brought for supposed errors in law apparent on the record and

---

*Past President, Mississippi State Bar; Associate Editor, Commercial Law Journal; Commissioner from Mississippi to National Conference on Uniform State Laws.

[1]Smulski v. Feinberg Furniture Co., 8 Harr. 411, 193 Atl. 585 (1937).

[2]1 Archb. Pr. K. B. 234.

[3]3 Md. 325, 3 Steph. Comm. 642.

[4]Mitchell v. State, 179 Miss. 814, 176 So. 743 (1937).

[5]State v. Rathie, 101 Ore. 339, 200 Pac. 790 (1921); Thornton, *Coram Nobis and Coram Vobis,* 5 Ind. L. J. 603 (1930).

[6]Lamb v. State, 91 Fla. 396, 107 So. 535 (1926). For a more complete history of the writs in England, see Pleas Before the King and His Justices, Vol. 68, published by Spottiswoode, Ballantyne and Company, Ltd., London. For American history of these writs see Orfield, Criminal Procedure From Arrest to Appeal (1947) published by N. Y. University Press. Also see 18 Chi-Kent Rev. 304, 22 B.U.L. Rev. 600, and 11 Md. L. Rev. 319.

[7] Holt v. State, 78 Miss. 631, 29 So. 527 (1901); Fellows v. Griffin, 17 Miss. 362 (1848).

take the case to a higher tribunal) in two particulars: (1) They contain no certiorari clause for there is no record to be certified. (2) They have no return day as they are in the nature of a commission only to the court to correct errors of fact.

Some modern examples of these two writs are proceedings had after one party is dead, or a judgment rendered against an infant, where death or infancy was not known, or against a person where a valid defense existed in the facts of the case, but which without negligence on the part of the defendant was not made either because of fraud, duress or excusable mistake, and in cases of insanity where the issue of insanity was not involved at the time the case was tried.[8]

In our American jurisprudence the writs are usually called *coram nobis* and *coram vobis* indiscriminately, but under the English practice the writ is called coram nobis or coram vobis accordingly as the proceedings are in the King's Bench or the Common Pleas, because the record as stated is to remain before us (the king) if the former, and before you (judges) if the latter.[9] The petition for either writ must be supported by affidavits and must satisfy the court in the following four particulars: (1) that the facts have been discovered since the trial;[10] (2) that the failure to discover the facts has not been due to lack of diligence on petitioner's part;[11] (3) that a different judgment would have been rendered on account of said facts;[12] and (4) that petitioner has no other remedy.[13]

Mississippi Concept

Our Mississippi courts, probably more than any others, have developed the law on these writs. As early as 1844 issue was joined upon the writ of error coram nobis and trial by a jury had upon said issue.[14] A few years later Chief Justice Sharkey stated, "A writ of error coram nobis is intended to correct a mistake in fact, not error of law. Errors must be assigned on it, and, if the fact be disputed, an issue is made up to be tried by a jury. If it be found for the plaintiff in error, the judgment is that

---

[8]Fugate v. State, 85 Miss. 94, 37 So. 554 (1904); Bennett v. State, 106 Miss. 103, 63 So. 339 (1913); Howie v. State, 121 Miss. 197, 83 So. 158 (1919). While this article was being prepared a convicted murderer gained a stay of execution on the ground of subsequent insanity. Musselwhite v. State, 60 So.2d 807 (Miss. 1952).

[9]Fugate v. State, *supra* note 8; People v. Reid, 195 Cal. 249, 232 Pac. 457 (1924); Sanders v. State, 85 Ind. 318 (1882).

[10]5 Ency. of Pleading and Practice 2.

[11]6 Am. and Eng. Ency. of Law 816.

[12]Jeffrey, *New Trial—Insanity—Writ of Error Coran Nobis,* 9 Texas L. Rev. 110 (1930).

[13]Sanders v. State, *supra* note 9; Dobbs v. State, 63 Kan. 321, 65 Pac. 658 (1901). Where there is a remedy by an appeal these types of writs will not lie. People v. Reid *supra* note 9.

[14]Keller v. Scott, 10 Miss. 81 (1844).

the former judgment be recalled and revoked."[15] In another early case[16] the Supreme Court in affirming a judgment of the Circuit Court of Yalobusha County made an erroneous entry of judgment. There a petition was addressed to the Circuit Court, but the higher court held that the Circuit Court had no jurisdiction. At first our Supreme Court refused to pass upon the question as to whether a writ of error coram nobis could be invoked in criminal cases,[17] but a few years later definitely committed itself to the proposition that the writ is available in criminal as well as civil cases.[18]

Next the Supreme Court enunciated the rule that the petitioner must show that the failure to present the facts to the court was without either fault or negligence on his part.[19] Also the fact that the evidence had not been adduced because of duress and fear did not meet the common law prerequisites because these facts were not unknown to petitioner at the time of the former trial.[20] Insanity is a ground for the writ.[21] The new facts, upon which the writ is predicated and as set forth in the petition, must not be such facts as tend to controvert the issue or bear upon any issue presented to the court and jury at the trial. As, for example, where the petitioner received a letter from one of the witnesses stating her testimony was sustained because the credibility of the witness and the truthfulness of her testimony were in issue in the original trial, and the petitioner was perfectly competent to understand the issue and conduct his defense.[22] The Mississippi Supreme Court is committed to the rule that the record remains in the circuit court and that the petition should be addressed to the circuit court, unless the error is made in the entry of the judgment on the minutes of the Supreme Court.[23] The circuit court cannot abdicate any part of its judicial function or duties in favor of the Supreme Court or any other tribunal.[24]

Mississippi's Modern Concept

About the time of the first Roosevelt administration some twenty years ago, our Supreme Court held that the issuance of the writ does not operate as a supersedeas but may be permitted to do so in proper cases upon giving security therefor.[25] Because of this leading case three articles

---

[15]Fellows v. Griffin, 17 Miss. 362 (1848).
[16]Land v. Williams, 20 Miss. 362 (1849).
[17]Holt v. State, 78 Miss. 631, 29 So. 527 (1900).
[18]Fugate v. State, *supra* note 8.
[19]Corby v. Buddendorff, 98 Miss. 98, 54 So. 84 (1910).
[20]Bennett v. State, *supra* note 8.
[21]Howie v. State, 121 Miss. 197, 508, 83 So. 158, 675 (1919).
[22]Cummings v. State, 144 Miss. 634, 110 So. 206 (1926).
[23]White v. State, 159 Miss. 207, 131 So. 96 (1930).
[24]St. Louis & S. F. Ry. v. Bridges, 156 Miss. 206, 125 So. 423 (1929).
[25]Carraway v. State, 163 Miss. 639, 141 So. 342 (1932).

appeared in the *Mississippi Law Journal*: Simon Rosenthal's "Writ of Error Coram Nobis,"[26] William I. McKay's "Necessity for Right of appeal from Denial of Writ of Error Coram Nobis,"[27] and Robert J. Farley's "Coram Nobis—Another View."[28]

Of course, in Mississippi "Writs of errors, as heretofore used, are abolished. . . ."[29] It is significant to note that when our Code of 1942 was published it provided:

> "The judges of the Supreme and circuit courts and chancellors, in term time and in vacation, may severally order the issuance of

---

[26]6 MISS. L. J. 133 (1933). Mr. Rosenthal concludes his article: "The writ of error *coram nobis* is certainly not obsolete in the State of Mississippi nor in any other common law state, unless made so by statute. It forms a necessary part of the practice and procedure in the Circuit Court; it forms no part of the practice in the Chancery Court for the Chancery Court is vested with its own machinery in matters of this kind, and the writ is exclusively a common law writ. It is true that there must be an end to litigaion. For this reason, the granting of the writ should be exercised with the utmost caution and the grounds for granting the writ must be certain and definite, and restricted to such cases as where the facts to be presented are such that if said facts had been presented to the court at the original trial, the judgment rendered would not have been rendered; or, if said facts had been presented and appeared on the records, the judgment would have been refused on appeal."

[27]6 MISS. L. J. 146 (1933). Mr. McKay writes: "Under supposed and so called statutory substitutes therefor, our bench and bar are inclined to relegate the quaint and curious common law writs of error coram nobis and coram vobis to the lingo of innocuous desuetude. The very nature and office of the writ limits the need therefor and restricts its application to comparatively rare occasions. However, where the need for it arises, its great importance appears.

"Where the judgment of our courts takes one's life, liberty or property and that judgment is vitiated by force, fraud, unfairness or invalidity, it should be blotted out forever and the court should find the remedy even to the extremity of impinging on juridical convenience and procedure. And if the courts cannot find a remedy, the legislature ought to provide one. We must not have our faith in our courts shaken. They are our last resort."

[28]6 MISS. L. J. 327 (1934). Dean Farley begins his article with these remarks: "One of the strangest developments in the law of Mississippi has been the present so-called writ of error coram nobis, a hybrid apparently borne of dictum, without pride of ancestry and now without hope of posterity—if we may take as final the denotation in *Carraway v. State*."

He concludes, after tracing the history of this writ and calling attention to our statute abolishing writs in Mississippi: "Nevertheless, this article is not intended as an attack on any of the decisions of the court; nor on the use of coram nobis. It is simply an effort to call attention to the fact that the so-called law of coram nobis in Mississippi is not a development of a remedy and is entirely inexplicable as such but is rather a development in the judicial process as to matters of policy: (1) Finality of judgments; (2) Power of trial courts; (3) Respective spheres of judiciary and executive. Any other approach to the study of our coram nobis would be misleading . . . and if the humanities of the case are sufficiently cogent, then a new chapter of coram nobis will be written differentiating that situation from the *Carraway* case. This should be the next run and when that has happened, then we shall have fully arrived where we should have been in 1880.

"One can learn all the common law of England, Michigan, Indiana, New York, the Federal Courts, Mississippi and all the jurisdictions without being able to answer in a given instance whether coram nobis would or would not lie."

[29]MISS. CODE § 1146 (1942), which brings forward MISS. CODE ANN. § 12 (1930). "Writs of error, as heretofore used, are abolished; and in all cases, civil and criminal, at law and in chancery, shall be taken to the Supreme Court by appeal as herein provided, and shall be dealt with by said court without regard to the manner of removing the cases to such courts."

> writs of habeas corpus, mandamus, certiorari, supersedeas and attachments, and grant injunctions and *all other remedial writs in all cases where the same may properly be granted* according to right and justice, returnable to any court, whether the suit or proceedings be pending in the district of the judge or chancellor granting same or not."[30] (Italics added.)

This section is broad enough to allow writs of errors coram nobis and coram vobis and, indeed, we see in the annotations under "Writ of Error Coram Nobis" a case holding:

> "Refusal of Supreme Court to grant an appeal from trial courts refusal to grant writ of error coram nobis did not leave petitioner without further remedy, since petitioner could apply to judge of Supreme Court for such writ."[31]

The law on the subject of these writs remained confused and seldom used until it appeared after the celebrated *Patton* case,[32] in which the United States Supreme Court held the intentional and arbitrary systematic exclusion of Negroes from grand and petit jury lists, solely because of their race, denies equal protection of the laws to a Negro charged with crime.

Then on November 2, 1945, an event took place which did more to crystallize the status of the writ than any other single event in the history of Mississippi. On that date at 4:00 A.M. Willie McGee sneaked into the bedroom of the prosecuting witness and committed rape but was not recognized at the time. The family in the adjoining rooms were not awakened. Later the following day the defendant was arrested in an adjoining county, the police having reason to suspect the defendant was the offending party.

The prosecuting witness was the mother of three children. A conviction resulted on the first trial, but the Supreme Court reversed the case and ordered a change of venue. Again a conviction resulted, and this time the Supreme Court reversed the case because of its ruling in the *Patton* case. After a third conviction an appeal was taken to the Supreme Court of the United States and again the case was sent back for trial. Finally, after the case had been before the Mississippi Supreme Court four times, the defendant was ordered executed July 27, 1950. Then Justice Burton granted a stay of execution. But the Supreme Court of the United States affirmed the decision of the Mississippi Supreme Court and denied the writ of error coram nobis. A new day was set for execution, but a new writ of error coram nobis was presented to Judge S. C. Mize, the

---

[30]Miss. Code § 1657 (1942).
[31]Buckler v. State, 173 Miss. 350, 161 So. 683 (1935).
[32]Patton v. State, 201 Miss. 410, 29 So.2d 96 (1946); 332 U.S. 463 (1947).

United States Circuit Judge who overruled it. Then it was presented to Judge Edwin R. Holmes of the Fifth Circuit Court of Appeals and he also denied the writ. After these two denials Justice Hugo Black granted a stay of execution as presented by the writ. This action was taken notwithstanding that only a few months earlier the United States Supreme Court had affirmed the Mississippi Supreme Court's decision, which had affirmed the trial court's decision and death sentence. Finally, after other rehearings were denied, the United States Supreme Court vacated Justice Black's stay of execution and on the new date set Willie McGee was finally executed.[33] Because of its interesting content and composition it is unfortunate that Chief Justice Harvey McGehee's opinion of July 25, 1950, denying the writ of error coram nobis does not appear in the reported cases. However, it was presented in vacation and therefore was never considered as a petition before the entire court in term time.

The great length of time necessary for justice to be achieved in this case was brought about largely by the use of the ancient writs of error coram nobis. Some of the officials of our state advocated a law, which is designed as a safeguard in such situations that may arise in the future and make the procedure clearer in criminal cases. The legislature passed and Governor White approved this procedure on April 14, 1952, to become the law of our state in ninety days.

The statute[34] recognizes the writ as heretofore defined by decisions, permits a petition to be filed in trial court only after presentation to a quorum of the Supreme Court and notice to the Attorney-General. Further provision is made for the hearing, appeal, stay of execution and res judicata.

Even with the fine safeguards placed around the writ of error coram nobis by our last legislature the courts have wide discretion in passing upon the merits of these writs, which will prove a further safeguard for their use.[35]

It is safe to predict that these ancient writs will appear more and more frequently in the jurisprudence of Mississippi.

---

[33]McGee v. State, 200 Miss. 350, 26 So.2d 680 (1946); 33 So.2d 843 (1948); 40 So.2d 150 (1949); 47 So.2d 155 (1950).

[34]House Bill No. 775 of the Regular Legislative Session 1952.

[35]Canizio v. New York, 327 U.S. 82 (1946), *rehearing denied*, 327 U.S. 816 (1946).

WRIT OF DISTRAINT

*Charles C. Jacobs, Jr.**

Early History

The writ of distraint or writ of distress, as it is sometimes called, is a remedy of such remote antiquity that we have no memorial of its origin.[1] It prevailed among the Gothic nations of Europe immediately after the disruption of the Roman Empire.[2] An early authority states that "the distress is a remedy given to the lord to recover the rent or services which the tenant hath obliged himself by his feudal contract to pay by way of retribution for his farm."[3] These services, when the feudal tenures prevailed, were chiefly of two sorts, either military, as attending the lord in war, or ministerial, as attending his courts in time of peace, and there assisting the lord in the distribution of justice, or ploughing or tilling his demesne. The non-performance of these services was by the old feudal law a forfeiture of the feud.[4]

Under early use of the processes of *gavelet* and *cessavit,* the landlord could seize the land itself for rent in arrears and hold it until payment was made. When these processes fell into disuse, distresses appear to have arisen, whereby instead of seizing the land the lord seized all the movables upon the land and held them until he received payment.[5]

Distress has been defined as a right which existed at common law by which a person might take the personal property of another into his possession and hold it as a pledge or security until he obtained satisfaction, by the payment of the debt, the discharge of some duty, or reparation for an injury done.[6] The party taking the property had the right to sell it in certain cases to obtain satisfaction, as when cattle was impounded for damage feasant.[7] The landlord who took the goods and chattels of the tenant upon the premises for non-payment of the rent was not authorized to sell such goods and chattels until the right was conferred by statute.[8]

Speaking of the common law distress for rent, it was said in the case of *Jones v. Ford*[9] that it was generally regarded as one of those instances

---

* Attorney at Law, Cleveland, Miss.

1 Hard v. Nearing, 44 Barb. 472, 488 (N.Y. 1865).

2 Stamps v. Gilman, 43 Miss. 456, 464 (1870).

3 3 Bacon's Abr. 163, 167.

4 *Ibid.*

5 Emig v. Cunningham, 62 Md. 458 (1884).

6 Boyd v. Howden, 3 Daly 455 (N.Y. 1871).

7 *Ibid.*

8 Pate v. Shannon, 69 Miss. 372, 13 So. 729 (1891); Stamps v. Gilman, *supra* note 2 at 456; Acme Harvesting Machine Co. v. Hinkley, 23 S.D. 509, 122 N.W. 482 (1909).

9 254 Fed. 645, 647 (8th Cir. 1918).

in which the right or remedy, however it may be classified, was in the hands of the party, without the necessity of judicial aid. However, if any judicial action was necessary to initiate or perfect the early distress, it belonged not to royal tribunals, but to manorial courts, which meant, of course, the court of the lord who was enforcing the distress.

The landlord, or his bailiff acting as his agent, was allowed to go on the demised premises and seize anything he might find there, irrespective of its ownership, and hold the same without sale or usage as a gage until the rental was paid. Such a process proved unsatisfactory and statutes have been enacted which call for seizure by some official, to prevent breaches of the peace.[10]

Distress is an extraordinary and summary remedy and is not a judicial process. It is returnable to no court in a pending suit and serves only as authority to the officer to do what the landlord at common law could do for himself.[11]

The distress at common law was a dormant right or privilege to take the thing into possession as a pledge or means of enforcing the tenant's payment of the rent. If this right was not made active by actual seizure it was utterly impotent, and in nowise encumbered the title of the tenant.[12] Distraint under the common law conferred on the landlord a right to subject certain property to the payment of the rent due—a right to acquire a lien and enforce it by summary proceedings, but not a lien.[13] The landlord had the right to seize any property on the premises demised, whether it belonged to the tenant or to some third person. But he could not follow the property removed from the premises, at common law, and he could not distrain before the rent was due. Statutes have altered the common law distress by limiting such seizure to the property of the tenant and by permitting seizure away from the demised premises.[14] But the statutes have not annihilated the fundamental characteristics of distress, to-wit, that the landlord shall, directly or indirectly, seize and control the gage without aid of judicial proceedings to establish his right.

Early History in Mississippi

It appears that an early territorial statute abolished the common law remedy of distress and allowed an action on the case for rent,[15] but in 1822 an act was passed which allowed attachment of the goods and chat-

---

[10] Jones v. Ford, *supra* note 9.
[11] See note 8 *supra.*
[12] See note 2 *supra.*
[13] Newman v. Bank of Greenville, 66 Miss. 323, 5 So. 753 (1889).
[14] See note 2 *supra.*
[15] Hutchinson's Code, c. 56, art. 5 (1848).

tels of a tenant for rent in arrear on leased premises,[16] which act, though greatly modified, is the basis for the statutory procedure existing at this time.

Under the 1822 act, as modified and set out in the Mississippi Revised Code of 1857,[17] it was held in the early case of *Mayre v. Dyche*[18] that rent is not per se a lien on goods found on the demised premises. It binds as a lien only when the goods are seized under an attachment for rent. In the meantime, the tenant may sell, dispose of, or encumber the same bona fide and for valuable consideration, notwithstanding the existence of a debt for rent. The power of alienation by the tenant exists until the goods are seized under an attachment for rent, without any limitation or restriction on account of the rent. This case specifically held that a recorded mortgage on crops and implements in favor of the party furnishing the tenant, and which was executed prior to the time of seizure under an attachment for rent, was superior to the claim of the landlord for rent.

A short time after the decision in this case, a statutory lien on agricultural products was given the landlord for rent and advances which is paramount to all other liens, claims or demands upon such products.[19] This lien broadened the landlord's rights considerably. In the case of *Henry v. Davis*[20] the court, in construing the statute, stated as follows:

> "There is a distinction between the agricultural products produced on the leased premises and other goods and chattels of the tenant. The statute creates a lien on the former, and gives the attachment to enforce it, while only a right to seize the latter is conferred. Goods and chattels of the tenant, other than agricultural products raised on the leased premises, are not subject to a lien for rent or advances for supplies and they can be seized only on the premises or off of them within the time prescribed by statute [thirty day] ; but this limitation of time or place is not applicable to the agricultural products of the leased premises on which the landlord has a lien, with the right to enforce it by seizure under attachment wherever and whenever found."

In addition to his lien for rent and advances, the landlord was given a statutory lien for one year on agricultural products, for the reasonable value of live stock, farming tools, implements and vehicles furnished by him to the tenant.[21]

---

[16] *Ibid.*
[17] C. 41, § 1 *et seq.*
[18] 42 Miss. 347 (1869).
[19] Miss. Code § 1301 (1880).
[20] 60 Miss. 212, 216 (1882).
[21] Miss. Code § 2496 (1892).

Distraint in Mississippi Today

In considering distraint or attachment in Mississippi, it is important to keep in mind that the landlord has a right of attachment against (1) the agricultural products raised on the premises; and (2) the goods and chattels of the tenant, other than agricultural products, which rights are not of the same scope.

His right of attachment on agricultural products is broader than his right to attach "goods and chattels," exclusive of agricultural products, because of the paramount lien given by statute on the former class of goods. The landlord's right to attach goods and chattels is limited to the following conditions: (1) when the landlord suspects and believes that the tenant will remove his effects before the expiration of his term; and (2) when the rent becomes due but remains unpaid and while the goods and chattels of the tenant are on the leased premises; and (3) within thirty days after the tenant has removed his goods and chattels from the leased premises, leaving the rent unpaid. And it appears that an attachment of the goods and chattels of the tenant may not be proper where there are sufficient agricultural products to satisfy the claim of the landlord.[22] The landlord has no lien on goods and chattels and his rights are exercised only by seizure. A mortgage prior to such seizure defeats the landlord's rights.[23]

A survey of the statutes relating to attachment in Mississippi reveals that an attachment may be sued out by the lessor of lands, his executors, administrators or assigns, for rent in arrear or to become due, and for advances.[24] The complaint or affidavit is made before any justice of the peace of the county in which the land or some part thereof is situated or of any county in which the property may be found. If anything is demanded on account of supplies, an itemized bill of particulars shall be filed with the complaint. The party asking for the writ must make bond in double the sum claimed to be due.

After complaint is made and bond given, the writ is issued commanding seizure of the agricultural products on which the lien is claimed and commanding the officer to distrain the goods and chattels other than those on which a lien is claimed, if necessary, and deal therewith according to law.

When the officer makes the distress or seizure, he gives notice to the tenant and then advertises the property for sale as under execution. The tenant may obtain the property before sale by giving bond, payable

[22] Miss. Code § 913 (1942).
[23] White v. Miazza-Woods Construction Co., 122 Miss. 213, 84 So. 181 (1920).
[24] Miss. Code § 910 *et seq.* (1942).

to the landlord, in double the amount of the claim, which bond is conditioned on payment of the claim by the end of three months after the making of the distress. But if no such bond is given, the officer proceeds to sell the property as advertised, and, out of the proceeds of the sale, he pays the costs and then satisfies the claim of the party suing out the writ.

If the tenant makes bond as above set out, such bond is delivered to the landlord, and if the claim is not paid according to the condition of the bond, the landlord may file the bond in a court having jurisdiction over the amount in controversy and move for execution against the obligors on the bond. After five days notice of such motion to the obligors, execution may be awarded.

The tenant may stop a sale of the goods by making affidavit before the officer holding the property that he does not owe or will not owe the amount claimed. Then the officer returns the attachment with the affidavit and a statement of his proceedings to the proper court and summons the party who sued out the writ. Further proceedings will then be had as though the tenant had replevied the goods, as below set out.

The tenant may also contest the right of the landlord to attach the property by replevying the same before trial. He replevys the property by giving bond in double the amount distrained for, conditioned on prosecution of his suit against the claimant at the next term of court. The officer, in such case, returns the bond with attachment papers to the circuit court or the justice of the peace court, depending on the amount in controversy; then the proceeding becomes a suit for the first time.[25] Summons is then issued for the party in whose name the distress was issued.

The party replevying the property may file a motion to quash the attachment proceedings or a declaration in replevin by the first day of the next term of circuit court to which the bond is returned. Or, if the bond is returned to a justice of the peace court, then the party appears and prosecutes his claims.

After the declaration is filed in the replevin suit, the party who originiated the distress action takes the position of a defendant and files either a plea denying that the goods were seized on his complaint or an avowry, stating that the goods were rightfully seized for rent or supplies. Plaintiff then files a replication denying the indebtedness to the defendant or stating that defendant did not have just cause to suspect and believe that plaintiff would remove his effects from the leased premises, as the case may be.

---

[25] Towns v. Boarman, 23 Miss. 186 (1851); Thornton v. Gardner, 134 Miss. 485, 99 So. 131 (1924).

The cause is triable at the next term of court, and, if judgment is taken in favor of plaintiff, he is allowed damages for the wrongful suing out of the writ. Such damages include attorney's fees.[26] And where a sale of the goods under distress is made when no rent or sum for supplies was due, the party causing the distress is liable to the tenant for double the value of the property so seized and sold.

If a stranger's property is seized under distraint, he may replevy the property in the same manner in which the tenant may do so, but the burden of proof as to ownership of the property in such cases is on the claimant.

The attachment writ and bond are not a part of the record in the replevying suit and must be introduced in evidence.[27]

Waiver

A consideration of the writ of distraint would be incomplete without a discussion of one phase of the law closely related thereto, which frequently arises in distraint or attachment proceedings. This involves the question of whether or not a landlord has waived his lien on agricultural products in favor of a bona fide purchaser for value of such products. There has been an abundance of litigation on this proposition.

In a case decided in 1887[28] it was said that a statement by the landlord that he had consented to sale of cotton by his tenant amounted to a waiver of his landlord's lien, and defeats his attachment proceeding against a bona fied purchaser for value of such products. Also, where the landlord entrusts the tenant with carrying the products to market and selling them for the landlord, it has been said that the landlord thus makes the tenant his agent for the sale of the products, and where the agent fails to pay over the funds from the sale, the landlord cannot recover from a bona fide purchaser without notice of the landlord's lien.[29]

The case of *McGee v. Carver*[30] went further than the cases above mentioned and held that the landlord, by permitting the tenant to store cotton raised on leased premises and on which he has a lien for rent, in a warehouse and receive negotiable receipts therefor in the tenant's name, lost his lien as against a bona fied purchaser of the cotton for value without notice of the landlord's lien. By trusting the tenant with indicia of

---

[26] Wigginton v. Moore, 147 Miss. 169, 113 So. 326 (1927); Rollings v. Rosenbaum, 166 Miss. 499, 148 So. 384 (1933).
[27] Barlow v. Serio, 129 Miss. 432, 91 So. 573 (1922).
[28] Cohn v. Smith, 64 Miss. 816, 2 So. 244 (1887).
[29] Seavey v. Godbold, 99 Miss. 113, 54 So. 838 (1911); Phillips v. Thomas, 128 Miss. 729 91 So. 420 (1922).
[30] 141 Miss. 463, 106 So. 760 (1926).

ownership, the landlord is precluded from asserting a lien thereon against one who purchased the warehouse receipts for value, in good faith.

However, in a case where the evidence showed that the landlord and tenant had an agreement that the cotton produced was to be stored at a particular warehouse and that receipts were to be issued in the name of the tenant and landlord, but the tenant violated the agreement and had receipts issued in his name, selling the cotton to a bona fied purchaser, it was held that the landlord's lien prevailed, even though the landlord took no steps to prevent the tenant from violating the agreement.[31] And a later case held that where cotton was warehoused by the tenant and the landlord's name was excluded from the receipt without the landlord's knowledge and consent, the tenant was not clothed by the landlord with indicia of ownership, so no estoppel could be applied against the landlord.[32] The fact that the landlord did not promptly discover the trespass could not be said to be negligence which, by estoppel, could relieve the purchaser from liability for conversion of the cotton.

A fairly recent case advances the statement that proof of waiver of the landlord's lien on agricultural products must be established by preponderant testimony which affirmatively shows agreement by the landlord, or conduct tantamount thereto, that tenant might deal with the products as if free from any lien.[33]

Conclusion

It appears to the writer that the proceedings for distraint or attachment in Mississippi are archaic. For an understanding of the procedure, and of the cases on such procedure, it is necessary to delve back into the common law, and to look back on its statutory development in Mississippi. It would seem that a simpler, more effective manner of protecting the landlord's claim for rent and advances could be worked out by the legislature, abrogating the hodge-podge of statutes on the subject today.

---

[31]Schmitt v. Federal Compress & Warehouse, 169 Miss. 589, 153 So. 815 (1934).
[32]Tennessee Bank v. Bank of Greenwood, 179 Miss. 534, 172 So. 323 (1937).
[33]Phillips v. Box, 204 Miss. 231, 37 So.2d 266 (1948).

WRIT OF GARNISHMENT

*R. P. Sugg**

Garnishment is a proceeding in which the plaintiff seeks to subject to his claim money owed by a third person to the defendant or property belonging to the defendant in the hands of a third person.

The remedy was probably derived from the custom of London whereby a citizen of London was enabled to pursue the effects and credits of a non-resident debtor in the hands of a third person. In the absence of statute the remedy would not exist because it is not one of the ancient common law remedies.[1]

It is generally conceded that as to the defendant, where there is no service of process on him and in the absence of an appearance, the proceeding is *in rem,* since the only effect is to subject the property of the defendant in the hands of the garnishee, or the debt due the defendant by the garnishee, to the payment of any amount adjudicated in favor of the plaintiff against the defendant.

The proceeding is against the garnishee personally to compel him to answer for the value of any debt owing the defendant by him or for the value of any property of the defendant which he might have.

Procedure for Obtaining Writ

Writs of garnishment may be obtained in the manner set forth in the Mississippi Code of 1942.[2] If it appears from the answer of the garnishee that there is any estate of the defendant in the hands of any person not summoned, an alias writ may at once be issued, to be levied on the property in the hands of such person, or he may be summoned as garnishee.

If the right to the writ of garnishment is based on a judgment or decree, the suggestion for the writ must be in writing and should be filed in such cause and should recite the recovery of the judgment by plaintiff against the defendant, the date and amount of the judgment, the residence of the garnishee, and the grounds for garnishment.

It is not necessary to suggest all four of the grounds for garnishment, but the judgment creditor has the right, if the facts justify it, to suggest any one or more of the four grounds.[3]

---

*Chancellor, 14th Chancery District, Eupora, Miss.
[1]38 C.J.S., Garnishment § 1.
[2]Sections 2783, 2784, and 2686.
[3]Universal Life Ins. Co. v. Catchings, 169 Miss. 26, 152 So. 817 (1934).

When issued on suing out attachment it appears that the suggestion may be made orally under Section 2784 of Mississippi Code of 1942, but it is better practice to file the suggestion in writing so that no confusion might arise as to the grounds of garnishment relied on.

Issuance of Writ

In cases where the right to have the writ is based on a judgment or decree, the writ will be issued by the clerk of the court where the judgment or decree was obtained, except in cases before justices of the peace, who shall issue the writ in cases before them.

If the suggestion is made when suing out attachment, the officer approving the attachment bond shall issue the writ of attachment and garnishment. If the writ is returnable before another court, and the suggestion is made after the issuance of the writ of attachment but before the attachment issue has been tried, the clerk of such court, or the justice of the peace, as the case may be, where the attachment issue is pending shall issue an alias writ of attachment and garnishment, but if he issues a writ of garnishment instead of an alias writ of attachment and garnishment, it is defective but not void, and may be amended on motion.[4]

Under the provisions of our statute[5] writs of garnishment may be issued by the officer receiving the writ of attachment where the writ does not contain a suggestion of garnishment; however, if the writ of attachment contains an order to summon a garnishee, and the officer, instead of serving the writ of garnishment, issued an independent writ to himself, and served that on the garnishee, the writ issued by the officer was unnecessary, but not unlawful.[6]

It will be noted that writs issued under Section 2686[7] are limited to two grounds; viz., all persons indebted to the defendant, or having in possession effects belonging to the defendant.

Service of Writ and Due Date of Answers

The writ of garnishment shall be served in the manner that a summons is required by law to be executed, and this is true regardless of whether it was issued in a case of attachment or on a judgment or decree.[8]

---

[4]C. C. Kelly Banking Co. v. Hollingsworth, 71 Miss. 141, 13 So. 932 (1893).
[5]Miss. Code § 2686 (1942).
[6]First Nat. Bank of Nashville, Tenn. v. First Nat. Bank of Tupelo, 72 Miss. 258, 16 So. 904 (1895).
[7]See note 5 *supra*.
[8]Miss. Code § 2787 (1942).

The answer of the garnishee shall in all cases, in the circuit or chancery court, be filed on the first day of the return term, and in the courts of justices of the peace, by noon on the return day of the writ.[9]

The provision as to the due date of the answer of the garnishee contemplates that the garnishee shall have been served at least five days before the term as in other cases. If he is not served five days before the return day no answer would be due, and default judgment could not be had in the absence of an answer.[10]

Venue

Writs of garnishment when issued on a judgment or decree shall be returnable to the court in which the judgment or decree was obtained, and in attachment cases to the court where the attachment is returnable, but if the answer of the garnishee be contested, and the garnishee shall not be a resident of the county where the cause is pending, then, upon an issue being made upon his answer, the venue may be changed, on his application, to the county of his residence.[11] Further, "The court in which the issue is tried shall cause the facts found to be certified and returned with the issue to the court from which the writ issued, and judgment shall be entered thereupon as if the issue had there been tried."[12]

In attachment cases our court has held,

> "The proper court of a garnishee's residence has jurisdiction against a householder who resides in another county to whom the garnishee is indebted. *Smith v. Mulhern,* 57 Miss. 591. But where, as in this case, the jurisdiction depends on the indebtedness of the garnishee to the defendant in attachment, if the garnishee owes nothing and has no effects of the defendant in his hands, or if he so answers, and his answer is not successfully controverted, the suit fails, and should be dismissed for the want of jurisdiction, unless this result is avoided by other process. . . ."[13]

If the garnishee is not a resident of the county to which the writ is returnable, and if his answer is controverted, the defendant cannot object to the venue and secure an order of transfer to the county of the residence of the garnishee.[14]

---

[9]*Id.* § 2800.
[10]Alexander v. Lloyd, 70 Miss. 622, 14 So. 22 (1893).
[11]*Id.* § 2808.
[12]*Ibid.*
[13]Baum v. Burnes, 66 Miss. 124, 5 So. 697 (1889).
[14]McCloud v. McCullers, 84 Miss. 20, 36 So. 65 (1904).

Failure of Garnishee to Answer

If the garnishee is personally summoned and fails to answer as required by law, the court shall enter a judgment against him for the amount of plaintiff's demand and all costs. Such judgment shall be final, unless cause be shown to the contrary during the same term, and execution shall issue on the judgment.

If the garnishee is not personally summoned, judgment nisi shall be rendered against him, and a scire facias awarded, returnable to the next term. In such cases if the court is satisfied that the garnishee can be personally served at once, the scire facias may be made returnable instantly.[15]

If the garnishee is personally served and fails to answer, and the court renders judgment nisi instead of final judgment, the garnishee is thus given an opportunity to answer the writ by the next term of court. In such a case the court has held, "The purpose of the judgment nisi was to give the garnishee another opportunity to answer the writ in accordance with the provisions of Section 2342, Code 1906."[16]

Section 2790[17] provides that no default judgment shall be rendered against the state or any political subdivision thereof for failing to answer. Section 2793 provides for a penalty in the amount of twenty-five dollars to be recovered in any court of competent jurisdiction from any person upon whom, in his representative capacity as an official or employee of the state or any political subdivision, a writ of garnishment has been served and who fails or refuses to answer such writ as provided by law.

Answer of Garnishee

The Code prescribes the matters to be answered by the garnishee.[18] If the suggestion of garnishment contains all four grounds for garnishment, the garnishee must answer as set forth in this section. It appears that the same rule that governs the answer to a bill of discovery should apply. As stated in *Mississippi Chancery Practice,* the rule is, ". . . The defendant being bound to give complete, distinct and particular responses as to all matters sought to be discovered and which are within his knowledge or of which reasonably he can obtain the knowledge."[19]

If, however, the plaintiff suggests only one or two of the grounds of garnishment, should the defendant answer all four of the grounds?

---

[15]Alexander v. Lloyd, *supra* note 10.
[16]Busby v. Merchants' & Manufacturers' Bank, 158 Miss. 843, 131 So. 645 (1931).
[17]Miss. Code (1942).
[18]*Id.* § 2788.
[19]Griffith, Mississippi Chancery Practice § 432 (2d ed. 1950).

Code Section 2785[20] provides the form for the writ of garnishment and it contains this language: ". . . (here copy in full every particular that a garnishee is required to answer). . . ." In the case of *Universal Life Ins. Co. v. Catchings,*[21] the court stated:

> "All of the provisions of the statute are to be construed together in order to make a reasonable scheme, unless, of course, such a construction would read out of the statute some one or more of its substantial provisions. So construing the statute, we are of opinion that a judgment creditor has the right, if the facts justify it, to suggest any one or more of the four grounds for garnishment. If appellant is right in its contention that it would render the proceeding void if all four are not suggested, regardless of whether there was any foundation in fact for that to be done, is an unreasonable construction of the statute. Such a construction would destroy its efficiency to some extent. To illustrate: A judgment creditor knows of some one indebted to the judgment debtor, and he knows or has good reason to believe there is no other ground for garnishment; if he should suggest that ground alone instead of going further and doing the fruitless thing of suggesting all the other grounds, the proceeding would be void. We cannot give our assent to that view of the statute."

Although Section 2788[22] lays down four divisions for the answer and they are not in the disjunctive, it appears that the same reasoning should apply to the answer as to the suggestion for the writ. Why should one be compelled to answer one or more of the grounds for garnishment, when not required by the plaintiff? It appears that if the garnishee fails to answer all four grounds for garnishment when only one is suggested, which is answered fully and completely, the garnishee should not suffer a default judgment for failing to answer the remaining three grounds.[23]

Answer of Garnishment May Be Contested

The plaintiff may contest the answer of the garnishee by specifying in writing in what particular he believes the answer to be incorrect. Thereupon the court shall try the issue at once, unless cause be shown for a continuance. If the plaintiff desires to contest the answer of the garnishee, he shall do so at the return term unless the court extend the time.[24]

---

[20]Miss. Code § 2785 (1942).
[21]169 Miss. 26, 152 So. 817 (1934).
[22]Miss. Code (1942).
[23]Work v. Waggoner, 82 Miss. 591, 35 So. 137 (1903). *But cf.* Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co., 197 Miss. 770, 21 So.2d 646 (1945).
[24]Miss. Code § 2806 (1942).

The defendant may also contest the answer of the garnishee, in writing, and he, like the plaintiff, shall specify in what particular the answer is untrue. When the defendant contests the answer of the garnishee, an issue shall be made up and tried between them, but the plaintiff may take judgment against the garnishee for the sum admitted by the garnishee, or for the condemnation of the property admitted to be in his hands, notwithstanding the contest.[25]

If the garnishee's answer is not contested as provided by law, it is conclusive.[26]

Exemptions

A garnishee is under a duty to suggest exemptions of the defendant and under Section 2799[27] when he answers, admitting the indebtedness or the possession of property due or belonging to the defendant, may show by his answer that he is advised and believes that the defendant does or will claim the debt or property, or some part thereof, as exempt from garnishment, levy, or sale. When such an answer is filed, the clerk or justice of the peace shall issue a summons for a resident defendant or make publication for a non-resident defendant notifying him of the garnishment and the answer, and requiring him to assert his right to the exemption.

Proceedings against the garnishee shall be stayed until the question of the defendant's right to the exemption is determined. If the defendant fail to appear, judgment by default may be taken against him, adjudging that the property or debt is not exempt; but if he appear, the court shall, on motion of the defendant, make up an issue to be tried between him and the plaintiff.

Garnishees should be very careful in their answers to set forth the exemptions of the defendant because exemptions are highly favored by the law, and their protection may be defeated by the intention or the neglect of the garnishee. A garnishee failing to suggest claim of exemption will remain liable to defendant.[28]

The chapter on garnishment and the independent chapter on exemptions must be so construed as to give harmonious effect to both.[29]

---

[25] *Id.* § 2807.
[26] Grenada Bank v. Seligman, 164 Miss. 168, 143 So. 474 (1932); Williams v. Jones, 42 Miss. 270 (1868).
[27] Miss. Code § 2799 (1942).
[28] Laurel v. Turner, 80 Miss. 530, 31 So. 965 (1902).
[29] Chapman v. Berry, 73 Miss. 437, 18 So. 918 (1895).

Claims to Debt or Property by Third Persons

The garnishee may, by his answer or by affidavit, at any time before final judgment against him, or after such judgment if he had not notice before judgment was rendered, show that another person claims title to or an interest in the debt or property admitted in his answer or found on a trial to be due or in his possession.

When the garnishee, under Section 2804,[30] thus compels interpleader, the court shall suspend all further proceedings against the garnishee, and the person claiming the property shall be brought in by summons or publication. The process should notify the claimant to appear and contest with the plaintiff the right to such debt or property.

The garnishee may then pay the money into court admitted in his answer and be discharged from liability to either party for the amount so paid. It is not specifically provided in such cases that the garnishee may surrender the property admitted in his answer, but under Section 2796[31] he may surrender property to the officer serving the writ. This section gives the garnishee the right to surrender the property at any time.

The garnishee should be very careful to give notice of the claims of third persons to the debt or property because they cannot, of their own motion, come in and claim it unless the garnishee set up the claim in his answer or affidavit.[32] If the garnishee fail to give notice of the claim of third persons, he then becomes liable to such claimant.[33]

Set-off and Counterclaim

If the defendant owes the garnishee, the garnishee may set-off the debt, and the technical rules of set-off in ordinary litigation are not applicable in garnishment proceedings where the purpose is to ascertain what the garnishee may owe the principal defendant.[34]

If the garnishee desires to plead set-off or counterclaim, he should first answer fully and then plead his set-off against the defendant. The statute does not prescribe the procedure to be followed in such cases, but the defendant should be notified by summons or publication of such claim of set-off or counterclaim, and if he appear and answer an issue made up and tried between them, and all proceedings by the plaintiff against the garnishee should be stayed.

---

[30]Miss. Code (1942).
[31]*Ibid.*
[32]Porter v. West, 64 Miss. 548, 8 So. 207 (1886).
[33]Horton v. Grant, 56 Miss. 404 (1879); Morin v. Bailey, 55 Miss. 580 (1878).
[34]Brondum v. Rosenblum, 151 Miss. 91, 117 So. 363 (1928); Melton Hardware Co. v. Heidelberg, 91 Miss. 598, 44 So. 857 (1907).

Debt and Property Bound as to Time

Garnishments bind money or property in the hands of, or received by, the garnishee, or debts due the defendant at the time of service, and also between the date of service and return day, and if the garnishee files his answer before the return day, the plaintiff, if he wishes, may demand a fuller answer. In that case a reasonable time must be allowed to amend the answer.[35]

In the event defendant was employed by the garnishee, all salary payments due the defendant from the time of the service of the writ until the return day would be bound, subject of course to the exemption, if any, of the defendant.

Garnishee May Plead That Judgment Is Void and May Raise Defects in Proceeding in Principal Action

Section 2803[36] provides that the garnishee may plead that the judgment under which the writ of garnishment was issued is void, and if his plea be sustained, no judgment shall be rendered against him.

This does not entitle the garnishee to object on the ground of the invalidity of the bond given for the protection of the attachment defendant.[37]

In an early case the rule was announced as follows:

> "The garnishee cannot object to mere irregularities and errors in the judgment against the defendant in attachment. Nor can he assign such for error in this court, unless the objection be so vital as to render the judgment against the defendant invalid and void."[38]

The court has also stated:

> "The jurisdictional regularity of judicial proceedings against a non-resident defendant may be challenged by the garnished defendant as a protection to himself, and a justification for performing any decree which may be rendered against him; otherwise, if there should be want of jurisdiction, the principal defendant would not be bound. He might be free to pursue the garnished defendant in another action and thus impose double liability on him."[39]

---

[35]Brondum v. Rosenblum, 151 Miss. 91, 117 So. 363 (1928); Columbus Ins. Co. v. Hirsh ,61 Miss. 74 (1833).
[36]Miss. Code (1942).
[37]Field v. McKinney, 60 Miss. 763 (1883).
[38]Erwin v. Heath, 50 Miss. 795 (1874).
[39]Kearney v. Kearney, 178 Miss. 766, 174 So. 59 (1937).

When Answer Admits Property of Defendant Is in Hands of Garnishee

Under Section 2796,[40] the garnishee may surrender the property of defendant in his hands to the sheriff or other officer serving the writ before answer filed, in which case the officer will dispose of the property as directed in this section.

If the answer filed admits possession of goods or chattels, Section 2801[41] provides that such goods or chattels shall be delivered to the sheriff; but, provides further that in attachment cases the garnishee may replevy the property by giving bond for the same, as the defendant in attachment may do, and subject to the same proceedings.

For his protection, if the garnishee have property of the defendant in his hands, he should file his answer and then deliver the property, because in his answer he can suggest exemptions of the defendant and claims of third persons and be protected as against them.

It will be noted that if he deliver the property under Section 2796[42] the property will be disposed of by the sheriff as therein directed, thus causing a possibility of liability on the part of the garnishee if the property was exempt, or subject to the claims of third persons.

Judgment and Execution

If the issue in any case be found against the garnishee, judgment shall be rendered against him for the amount of the debt or money or property in his hands, in favor of the plaintiff, if necessary to satisfy his judgment or claim against the defendant. Judgment for the plaintiff should not exceed either the amount of plaintiff's claim or the value of the money or debt or property in the hands of the garnishee. If the judgment of the plaintiff has been partially satisfied, judgment shall be rendered for the plaintiff in the amount necessary to satisfy the plaintiff's judgment or claim, the balance if any, in favor of the defendant.

Section 2810[43] prescribes in detail the procedure for assessing property. Under this section the jury or the court trying the issue must assess the value of the property, separately assessing the value of each item, but in case the value is not assessed, a writ of inquiry may be awarded.[44]

If a garnishee admits an indebtedness not then due, execution shall be

---

[40] Miss. Code (1942).
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] Atkinson v. Foxworth, 53 Miss. 733 (1876); Thomason v. Wadlington, 53 Miss. 560 (1876); Bedon v. Alexander, 47 Miss. 254 (1872).

stayed until its maturity. If he denies the indebtedness and on a trial it is found that he owes a debt not then due, judgment will be stayed as if the fact had been confessed in the answer.[45] In such cases if the judgment fail to stay the execution, it cannot be rightfully issued until the debt is due.[46]

The object of a garnishment is to subject money or effects in the hands of a party, belonging to another, against whom plaintiff either has, or expects to have, a judgment; hence a judgment cannot be rendered against a garnishee until one has been obtained against his creditor,[47] or against the defendant.[48]

Conclusion

The garnishee is in the rather unenviable position of incurring liabilities without hope of reward. A garnishee should, in order to protect himself, answer the writ fully, suggest exemptions and claims of third persons, ascertain if the judgment on which the garnishment is sought is void, and pay into court after answer any money he owes the defendant in order to avoid the running of interest.[49]

He is required to answer fully, without any equivocation, and deal fairly with all parties if he is to escape liability. He is regarded in some cases as a "stakeholder," and must at all times conduct himself so as not to prejudice the rights of any person.

---

[45]Miss. Code § 2801 (1942); Red v. Powers, 69 Miss. 242, 13 So. 586 (1891).
[46]Anderson v. Wanzer, 6 Miss. 587 (1841).
[47]Metcalf v. Steele, 42 Miss. 511 (1869); Roberts v. Barry, 42 Miss. 260 (1868).
[48]Kellogg v. Freeman, 50 Miss. 127 (1874).
[49]Smith v. German Bank, 60 Miss. 69 (1882). The Court stated that "Whatever may be the rule in other States it is distinctly settled in this State . . . that a garnishee is liable for interest on the debt due him pendente lite."

WRIT OF HABEAS CORPUS

*William H. Bizzell**

Nature of Writ

The writ of habeas corpus has been referred to as "the most celebrated writ in the English Law."[1] It is "the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."[2] The Constitutions of the United States and of the state of Mississippi contain provisions guarding against its suspension.[3]

Although habeas corpus is an ancient common law writ, it is largely governed by statute today. The Mississippi statutes are very detailed,[4] and in the ordinary case they leave comparatively little in question either as to procedure or right to relief. They apparently have stood the test of time well, not having been changed since 1892.[5]

The writ in Mississippi extends to "all cases of illegal confinement or detention by which any person is deprived of his liberty or by which the rightful custody of any person is withheld from the person entitled thereto."[6] It is considered a civil, rather than criminal, proceeding.[7] Except for the relatively modern use to obtain custody of minors, the purpose of the writ is merely to obtain release from unlawful confinement; it cannot serve to determine the guilt or innocence of one charged with crime,[8] or to re-try that question once he has been convicted.[9] Since the relief sought is liberty, the writ is not applicable unless there is actual restraint.[10]

---

*Levingston & Bizzell, Cleveland, Miss.

[1]39 C.J.S., Habeas Corpus § 1, p. 427.

[2]Bowen v. Johnston, 306 U.S. 19 (1939).

[3]U.S. Const. art. I, § 9, cl. 2; Miss. Const. art. III, § 21.

[4]Miss. Code §§ 2815-2840 (1942). Several other sections concerned directly or indirectly with the writ are cited throughout this article.

[5]Miss. Code §§ 2226-2251 (1892). Comparatively little change has been made since 1871. Miss. Code §§ 1396-1418 (1871). The writ has been governed by statute since Territorial days. Stat. Miss. Ter., pp. 228-232 (1816).

[6]Miss. Code § 2815 (1942).

[7]Ullom v. Davis, 169 Miss. 208, 150 So. 519 (1933); Edmonson v. Ramsey, 122 Miss. 450, 84 So. 455 (1920); State v. Gordon, 105 Miss. 454, 62 So. 431 (1913).

[8]State v. Morgan, 114 Miss. 634, 75 So. 441 (1917); *Ex parte* Collier, 12 So. 597 (Miss. 1893).

[9]Hays v. Barnes, 148 Miss. 599, 114 So. 395 (1927); Donnell v. State, 48 Miss. 661 (1873).

[10]James v. Waldrop, 156 Miss. 322, 126 So. 15 (1930) (released on bond); *Ex parte* Walker, 53 Miss. 366 (1876) and Hamilton v. Flowers, 57 Miss. 14 (1879) (prisoner escaped). *But see* Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931), holding that parent should have adjudication of his right to custody, despite fact that he already has custody.

Jurisdiction and Venue

Our statutes provide that the writ of habeas corpus may be granted by a judge of the Supreme Court or a judge of the circuit or chancery court, in term time or in vacation.[11] The authority is in the judge in his individual capacity, and not in the court, in each instance.[12] In those counties with a county court, the county judge also has the power to issue writs and try matters of habeas corpus.[13] The county judge acts with the same authority as a circuit judge or chancellor under the general habeas corpus statutes.[14] The judge or chancellor issuing the writ may make it returnable before himself or before another judge or chancellor.[15] Any judge or chancellor who wilfully refuses or neglects to grant, or to issue and try, the writ of habeas corpus, when required by law to do so, is guilty of high misdemeanor in office, and is liable civilly to the party aggrieved.[16]

The statute provides that the petition shall be made to the judge or chancellor of the district in which the relator is imprisoned, unless good cause be shown in the petition to the contrary.[17] Where the petitioner is imprisoned elsewhere, as in the state penitentiary, the exception would seem to allow making the writ returnable to the county from which he was sentenced and in which the witnesses and the records of his trial will be most readily available.[18]

The statute further provides that where granted before conviction on a criminal charge, the writ will be made returnable in the county in which the offense is alleged to have been committed.[19] This statute is, however, merely directory and not mandatory, and in such case the writ may be heard in the county where the petitioner is imprisoned if such would best suit the convenience of the state, the petitioner, and the witnesses.[20] However, a judge does not have jurisdiction to issue and try a writ of habeas corpus which is to run completely outside the district of such judge.[21]

Courts of this state can, of course, have no jurisdiction where the

---

[11]Miss. Code §§ 1657, 2818 (1942).
[12]*Ex parte* Hickey, 12 Miss. 751 (1845).
[13]Miss. Code § 1609 (1942).
[14]Cole v. Cole, 194 Miss. 292, 12 So.2d 424 (1943).
[15]Miss. Code §§ 1657, 2818 (1942).
[16]*Id.* § 2822.
[17]*Id.* § 2819.
[18]See Miller v. State, 207 Miss. 156, 41 So.2d 375 (1949), *app. dism'd and cert. denied*, 338 U.S. 844 (1949).
[19]Miss. Code § 2826 (1942).
[20]*Ex parte* Patterson, 71 Miss. 675, 15 So. 794 (1894).
[21]McLeod v. McLeod, 88 Miss. 722, 42 So. 873 (1907).

person whose liberty or custody is involved is situate without the territorial limits of the state.[22]

There is expressly excepted from the jurisdiction of the habeas corpus court any person imprisoned under a lawful judgment,[23] and any person convicted or charged with an offense committed elsewhere in the United States who ought to be delivered to the state or territory where such offense was committed.[24]

The jurisdiction on habeas corpus is further limited by the statutory rule that a judgment on one trial of habeas corpus is conclusive until reversed, and accordingly is res judicata and a bar to another writ in the same cause.[25] However, the rule does not prevent a petition for habeas corpus based on facts occurring since the previous hearing.[26] This exception is relied upon frequently to allow repeated petitions for the same relief, particularly in matters of bail in capital cases[27] and of custody of minors.[28]

Proceedings and Relief

Petition

The application for writ of habeas corpus is by petition, in writing.[29] The petition must be sworn to by the person for whose relief it is intended, or by someone in his behalf.[30] It should describe where and by whom the petitioner is deprived of liberty and the facts and circumstances of the restraint, with the ground relied on for relief.[31] If sufficient ground for relief does not appear from the face of the petition, it is fatally defective, and the judge or chancellor may refuse to grant the writ; and if he does

---

[22]For application of this general rule in habeas corpus cases, *see e.g.*, Haynie v. Hudgins, 122 Miss. 838, 85 So. 99 (1920) and Nations v. Alvis, 13 Miss. 338 (1845).

[23]Miss. Code § 2816 (1942).

[24]*Ibid.*

[25]Miss. Code § 2836 (1942); *Ex parte* Atkinson, 101 Miss. 744, 58 So. 215 (1912); Campbell v. Campbell, 159 Miss. 708, 132 So. 324 (1931). This is contrary to common law. *Ex parte* Pattison, 56 Miss. 161 (1878). But it is constitutional. *Ex parte* Hamilton, 65 Miss. 98, 3 So. 68 (1887).

[26]*Ex parte* Pattison, *supra note* 25.

[27]Intervening mistrial or failure in health may constitue ground for second hearing. See note 26 *supra*. Indictment after bail granted may justify withdrawal of right to bail. *Ex parte* Bridewell, 57 Miss. 177 (1879). But indictment after bail refused does not give prisoner right to another hearing. *Ex parte* Hamilton, *supra* note 25. Nor does intervening change in law. *Ex parte* Nichols, 62 Miss. 158 (1884).

[28]Campbell v. Campbell, *supra* note 25; Watts v. Smylie, 116 Miss. 12, 76 So. 684 (1917).

[29]Miss. Code § 2819 (1942).

[30]*Ibid.* See Maples v. Maples, 49 Miss. 393 (1873), where petition was signed by agent of mother seeking custody of her child.

[31]Miss. Code § 2819 (1942).

so he should endorse on the application his reason therefor;[32] granting of the writ is not mandatory if grounds for relief are not stated.[33]

No particular form is required for the petition.[34] In view of the fact that various relief can be granted by the court,[35] it would seem proper to petition for alternative relief, and such has been the practice on occasion.[36] Where the rights to be enforced are based upon an instrument of writing, it would seem good practice to attach a copy thereof to the petition.[37]

The Writ

If on the face of the petition the judge determines that a case for relief is stated, then he shall grant the writ, with heavy penalties provided in case of his willful refusal or neglect to do so.[38] The writ shall be returnable before himself or another proper judge,[39] either forthwith or within a reasonable time to be set by him, and at a place to be named by him.[40] The judge may either order the writ to be issued by the clerk or he may himself issue it.[41] The writ may be granted, issued and executed on Sunday.[42]

Where the detention is on a criminal charge, the judge or chancellor may in his discretion on granting the writ require a bail bond, which does not act to release the petitioner from custody, but merely secures the habeas corpus court against an escape while the prisoner is in its jurisdiction.[43]

The statute provides a form for the writ and provides by whom it shall be served and how, and that it shall be returned with an endorsement of service as in other cases.[44] If there be reasonable ground to apprehend that the person detaining the petitioner will not deliver him up but conceal

---

[32]*Id.* § 2820; *Ex parte* Gibson, 12 So. 209 (Miss. 1892). An early case apparently contrary is White v. State, 9 Miss. 149 (1844), which held in effect that all that is necessary in affidavit for writ is to allege affiant is illegally detained, and that all else is surplusage and immaterial; however, at the time of that decision the statute merely required that the applicant show ". . . by affidavit or other evidence, probable cause to believe that he is detained. . . ." Miss. Rev. Code, c. 33 § 1 (Poindexter, 1824).

[33]Lewis v. State, 153 Miss. 759, 121 So. 493 (1929).

[34]See Morris v. Waldrop, 151 Miss. 553, 118 So. 621 (1928) for example of petition stating fully the grounds relied on for relief (which was denied).

[35]Miss. Code § 2831 (1942).

[36]*E.g.*, Strickland v. Coopwood, 61 So.2d 315 (Miss. 1952), and Street v. State, 43 Miss. 1 (1870).

[37]Miss. Code §§ 1460, 1470 (1942). In Cole v. Cole, *supra* note 14, application of these statutes to petition for habeas corpus was conceded without expressly deciding the point.

[38]Miss. Code § 2822 (1942).

[39]*Id.* § 2818.

[40]*Id.* § 2826.

[41]*Id.* § 2822.

[42]*Id.* §§ 1657, 2825.

[43]*Id.* § 2821.

[44]*Id.* § 2823.

or remove him, then the writ may be directed to the sheriff or other officer to bring the person detained before the judge and summon the party alleged to be detaining him.[45] Where it appears that a crime may have been committed by one unlawfully detaining another, the judge may embody in the writ a warrant for the arrest of one committing such crime and may commit him after a hearing thereon.[46] In case the writ be returned "not found" and there be reason to suspect that the person alleged to be detained is being concealed, then the court may issue such further writs as may seem necessary, requiring the defendant to produce the one detained or to show to the satisfaction of the judge that he cannot do so.[47]

Insofar as may be consistent with the general statutes on habeas corpus, the issuance, service and return of the writ and other process should be in conformity with the general statutory requirements as to process.[48]

Other Pleadings

The person on whom the writ is served or who is summoned thereby must bring the person detained or permit him to be brought before the judge who is to try the case, at the time and place designated in the writ, and he is also required to make a "return or answer" to the writ.[49] This return or answer should be signed by the person making it and should either be verified by oath or signed by a sworn public officer in his official capacity.[50]

The statute provides in detail the contents required in the answer.[51] Briefly they are: (1) whether he has the relator in his custody; (2) if so, the authority and cause of such imprisonment or restraint, "setting forth the same at large"; (3) a copy of any writ, warrant or other written authority relied on for the restraint; (4) if the relator is no longer in custody or under restraint, then the particular facts thereasto. It has been held that if the answer contains these items required by statute, then it is not necessary for it to go into a detailed denial of the allegations of the petition.[52] The question has been raised as to whether the petitioner will be entitled to a release when the person summoned fails to file a return or answer, but the Mississippi Court avoided a decision on this point.[53]

---

[45] *Id.* § 2824.
[46] *Id.* § 2827.
[47] Lowndes County v. Leigh, 69 Miss. 754, 13 So. 854 (1892).
[48] Miss. Code § 1844 *et seq.* (1942).
[49] *Id.* § 2828.
[50] *Id.* § 2829.
[51] *Ibid.*
[52] Birdsong v. Blackman, 127 Miss. 693, 90 So. 441 (1922).
[53] *Ex parte* Moody, 104 Miss. 836, 61 So. 741 (1913).

The statutes make no further provision as to pleadings in habeas corpus action. In some cases a "traverse" has been filed to the return or answer.[54] Issue has been joined and cases disposed of on motion to quash the writ.[55] A demurrer to the petition is not unusual.[56] Where a demurrer to the petition is sustained, the court should allow the petitioner to amend.[57]

Trial

The person to whom the writ is directed or who is summoned thereby must bring the body of the person detained before the judge who is to try the case, at the time and place designated.[58] Failure to do so renders him liable to a penalty in favor of the petitioner and to proceedings for contempt; obedience may be enforced by attachment or otherwise.[59] The judge or chancellor on a habeas corpus hearing in vacation has the same power to fine and imprison for contempt as in term time.[60]

The statute provides that on the trial the judge ". . . shall inquire into the cause of imprisonment or detention . . ." and shall grant relief ". . . as the law and the evidence shall require."[61] The order of proof is not prescribed and it would seem that the trial judge has a rather broad discretion as to the conduct of the inquiry.[62] Continuances may be granted within the discretion of the trial judge.[63] If it should appear that further evidence is important to the case and procurable, then the judge should postpone or continue the case until such evidence can be had.[64] The statute provides that the judge ". . . may make any temporary order in the cause during the progress of the proceedings that may be right and proper, or that justice may require."[65]

Since the proceeding is civil in nature, the petitioner has the same right as in other civil proceedings to take a voluntary non-suit without prejudice at any time prior to the court's ruling on his petition.[66]

In all habeas corpus trials of persons charged with capital offenses,

---

[54]Ullom v. Davis, *supra* note 7; Grace v. Dogan, 151 Miss. 267, 117 So. 596 (1928).
[55]Ullom v. Davis, *supra* note 7.
[56]Russell v. Crumpton, 208 Miss. 433, 44 So.2d 527 (1950); Robbins v. Waldrop, 162 Miss. 803, 140 So. 230 (1932).
[57]Russell v. Crumpton, *supra* note 56.
[58]Miss. Code § 2828 (1942).
[59]*Id.* § 2830.
[60]*Id.* § 2837; Shattuck v. State, 51 Miss. 50 (1875) (sheriff fined for contempt for failure to obey writ).
[61]Miss. Code § 2831 (1942).
[62]Slade v. State, 119 So. 355 (Miss. 1928).
[63]Miss. Code § 2831 (1942); Roberson v. Quave, 211 Miss. 398, 51 So.2d 62 (1951).
[64]*Ex parte* Floyd, 60 Miss. 913 (1883).
[65]Miss. Code § 2832 (1942).
[66]Strickland v. Coopwood, *supra* note 36.

the county prosecuting attorney is required to appear and represent the state.[67] The sheriff, when required by the judge, must attend the trial of any habeas corpus in his county, to keep order and to execute the mandate of the judge, either in vacation or term time.[68]

Although one of the duties of a court reporter is to report habeas corpus matters,[69] our statute on habeas corpus provides that the proceedings shall be written out and signed by the judge or chancellor and deposited with the circuit clerk, and, if either party requires it, the evidence shall be made a part of the record by bill of exceptions.[70] Where there is an adequate bill of exceptions, it has been held that there is no prejudice in a refusal to allow a stenographic record.[71]

The judge or chancellor may issue or order subpoenas for witnesses, and compel their attendance as a circuit court could in term time.[72] Attachments and fines may be had for defaulting witnesses.[73] Witnesses may be fined for contempt,[74] and may be prosecuted for perjury for false testimony given on a habeas corpus hearing.[75] Witnesses are entitled to similar compensation as in other cases.[76] Whenever the personal attendance of a witness cannot be procured, his affidavit, taken on reasonable notice to the adverse party, may be received in evidence.[77]

Since habeas corpus hearings are so frequently concerned with that which occurred on some previous hearing or trial, it is quite usual to have an entire transcript of testimony at a previous hearing introduced and made a part of the record on the habeas corpus trial.[78]

The return or answer to the writ is not conclusive as to the facts therein stated, but evidence may be received to contradict them.[79] However, a return sufficient on its face creates a prima facie case and the burden of proof is thereby placed on the petitioner.[80]

---

[67]MISS. CODE § 3815 (1942)
[68]*Id.* § 2837. Sheriff's fee for such attendance is allowed by MISS. CODE § 3936 (A)(u) (1950 Supp.).
[69]MISS. CODE § 1636 (1942).
[70]*Id.* § 2835.
[71]Hegwood v. State, 213 Miss. 693, 57 So.2d 500 (1952).
[72]MISS. CODE § 2834 (1942).
[73]*Id.* § 2839.
[74]*Id.* § 2834.
[75]See note 62 *supra.*
[76]MISS. CODE § 2840 (1942).
[77]*Id.* § 2834.
[78]See Murphy v. Lawhon, 213 Miss. 513, 57 So.2d 154 (1952).
[79]MISS. CODE § 2833 (1942).
[80]See note 62 *supra; Ex parte* Jefferson, 62 Miss. 223 (1884).

Relief Granted

The habeas corpus court may ". . . either discharge, commit, admit to bail, or remand the prisoner, or award the custody to the party entitled thereto, as the law and the evidence may require."[81] The primary relief sought is, of course, liberty and not acquittal.[82] Accordingly, where one is released on bond, he cannot complain that he should have been discharged instead of admitted to bail, and no appeal will be considered on such complaint.[83]

The statute provides specifically that if on habeas corpus it is found that prior criminal proceedings were invalid but that the petitioner ought to be held for the alleged crime, then he should not be discharged but should be again committed or released on bail as the case may be.[84] A similar practice will be followed on appeal so that if the judgment is held to be void, the prisoner will be remanded to stand trial again;[85] and where an improper sentence is given on a lawful conviction, the petitioner will be remanded for a proper sentence.[86] However, where the proceedings are invalid and, in addition, the evidence before the judge shows that the accused is not guilty of any crime, then it is proper for the prisoner to be discharged.[87]

Where the petitioner is admitted to bail on habeas corpus, the judge should set the amount of bail and sureties required and may leave approval of the bond to the sheriff.[88]

Costs and charges may be awarded for or against either party as may seem right.[89] Where the application is in the nature of a civil action between parties, security for costs may be demanded by the clerk and costs may be taxed and collected as in other cases.[90]

---

[81]Miss. Code § 2831 (1942).

[82]*Ex parte* Walker, *Supra* note 10.

[83]*Ibid.;* James v. Waldrop, *supra* note 10. *But see* Sinquefield v. Valentine, *supra* note 10, where it was held that a parent had a right to appeal from an adverse habeas corpus judgment even though he already had custody of the children.

[84]Miss. Code § 2817 (1942). This section is merely declarative of pre-existing law. *Ex parte* Hamilton, *supra* note 10.

[85]Wheeler v. Shoemake, 213 Miss. 374, 57 So.2d 267 (1952); *Ex parte* Scott, 70 Miss. 247, 11 So. 657 (1892).

[86]*Ex parte* Burden, 92 Miss. 14, 56 So. 1 (1907).

[87]*Ex parte* Weems, 96 Miss. 635, 51 So. 2 (1910); *Ex parte* Harris, 85 Miss. 4, 37 So. 505 (1904).

[88]Miss. Code §§ 2485, 2486 (1942). Several early decisions holding that bond must be approved by judge granting habeas corpus were decided prior to amendments extending these sections to habeas corpus cases.

[89]*Id.* § 2831. *E.g.,* Richards v. Phillis, 28 So. 807 (Miss. 1900) (no judgment against defendant for costs where no actual showing that minors involved were in his custody at time of service of writ), and Matthews v. Walker, 57 Miss. 337 (1879) (costs charged to sheriff individually where he held prisoner wrongfully).

[90]Miss. Code § 2838 (1942).

Appeal

Any party aggrieved by the judgment on habeas corpus shall have an appeal to the Supreme Court.[91] Since the proceeding is civil rather than criminal in nature, the right of appeal is also given to the state[92] or to the sheriff or other officer against whom the writ is directed.[93]

Where the appeal is by the person deprived of his liberty it is made on the same terms and conditions as provided for in criminal cases.[94] In other cases the appeal is on the terms prescribed for appeals in civil cases where supersedeas is not desired.[95] Where the appeal is by a person deprived of his liberty, it may be returnable before the Supreme Court immediately and is given speedy and preferential hearing.[96]

On appeal, it will be presumed that the judgment of the trial court was correct, and where the evidence is conflicting the findings of the trial judge will not be disturbed if supported by the evidence and not manifestly wrong.[97]

In habeas corpus proceedings a county judge acts, not as a county court, but with all the power and authority of a circuit judge or chancellor, and hence an appeal may be taken from his decision directly to the Supreme Court.[98] Some appeals have been taken directly in this manner[99] but in other cases the appeal has been first to the circuit court and then to the Supreme Court.[100]

Particular Uses of Writ

Criminal Proceedings

The writ of habeas corpus in Mississippi applies, so far as criminal matters are concerned, only to ". . . all cases of illegal confinement or detention by which any person is deprived of his liberty."[101] Hence the purpose of any such habeas corpus proceedings is to determine whether the confinement is "illegal." The following are the more common attacks made on various phases of criminal proceedings.

---

[91] *Id.* § 1149.

[92] *Ibid.;* State v. Boyd, 110 Miss. 565, 70 So. 692 (1916); State v. Gordon, *supra* note 7.

[93] Edmonson v. Ramsey, *supra* note 7.

[94] Miss. Code § 1177 (1942). For suggested form of appeal bond, see 1 Morse, Mississippi Legal Forms 10 1950).

[95] Miss. Code § 1177 (1942). This method apparently would apply to appeal by state or appeal in custody matters.

[96] *Id.* § 1956.

[97] See note 18 *supra;* Lee v. Hudson, 165 Miss. 756, 144 So. 240 (1932).

[98] Miss. Code § 1149 (1942); see note 14 *supra.*

[99] Jones v. Wetzel, 60 So.2d 781 (Miss. 1952); Walker v. Williams, 58 So.2d 79 (Miss. 1952); see note 14 *supra.*

[100] Payne v. Payne, 213 Miss. 815, 58 So.2d 377 (1952); Sinquefield v. Valentine, *supra* note 10.

[101] Miss. Code § 2815 (1952).

Lack of Jurisdiction. A petitioner is entitled to relief on habeas corpus where he is held under judgment of a court without jurisdiction,[102] as, for instance, where there was no process served on a child before committing him to industrial school[103] or where the circuit court convicted a person less than eighteen years of age, though the Youth Court Act had deprived that court of jurisdiction.[104]

> "Stated in general terms the writ of habeas corpus will lie whenever the court did not have jurisdiction of the subject matter or of the parties, or where it has jurisdiction of the subject matter or of the parties, but makes an order which it did not have power to make in the case."[105]

Void Indictment or Conviction. When the judgment or proceedings are void on their face, so to be subject to collateral attack, then the aggrieved party may resort to habeas corpus and is not confined to an appeal.[106] Accordingly, relief may be granted where the record shows that the judgment and sentence were entered in vacation,[107] or where the record shows that verdict was returned by an eleven man jury.[108] Likewise relief may be granted where the affidavit or indictment is fatally defective, as where it charges no offense known to the law,[109] or where the very execution of the affidavit is denied by the prosecuting witness and in addition the evidence shows no offense.[110] On the other hand, it has been frequently said that one cannot on habeas corpus go behind a judgment regular on its face.[111] Hence the writ cannot be sustained on the ground that the judge was absent when the jury returned its verdict,[112] or on the ground that one juror was a non-resident of the county.[113] One will not be released on habeas corpus because of the most serious of defects or errors in the record of conviction, if not so defective as to be a nullity.[114] The writ cannot be used to attack a conviction on the ground of interest or relationship of the judge.[115] Where an insufficient indictment[116] or a

---

[102]Donnell v. State, *supra* note 9; *Ex parte* Adams, 25 Miss. 883 (1853).
[103]Maddox v. Bush, 191 Miss. 748, 4 So.2d 302 (1941).
[104]Wheeler v. Shoemake, *supra* note 85.
[105]State v. Chambliss, 142 Miss. 256, 275, 107 So. 200, 205 (1926).
[106]Kelly v. Douglas, 164 Miss. 153, 144 So. 237 (1932).
[107]White v. State, 185 Miss. 307, 188 So. 8 (1939).
[108]*Ex parte* Scott, *supra* note 85.
[109]See note 87 *supra*.
[110]*Ex parte* Jackson, 63 So. 571 (Miss. 1913).
[111]State v. Boyd. *supra* note 92.
[112]*Ibid.*
[113]Lewis v. State, 153 Miss. 759, 121 So. 493 (1929).
[114]*Ex parte* Grubbs, 79 Miss. 358, 30 So. 708 (1901); *Ex parte* Phillips, 57 Miss. 357 (1879).
[115]Hays v. Barnes, 148 Miss. 599, 114 So. 395 (1927); Dixon v. Rowland, 143 Miss. 270, 108 So. 807 (1926).
[116]Emanuel v. State, 36 Miss. 627 (1859).

faulty judgment[117] has been specifically attacked in, and upheld by, the trial court, the only further recourse is to appeal, and such action of the trial court cannot be attacked collaterally through habeas corpus. Likewise where a conviction has been affirmed by the Supreme Court after a consideration of the entire record, the conviction cannot be attacked on habeas corpus on grounds that the judgment is void because the minutes of the trial court were not signed.[118]

Delay in Indictment or Trial. Neither the intervention of a term of court without an indictment being returned,[119] nor delay of the state in bringing the case to trial,[120] will entitle the accused to a discharge, although either event may strengthen his right to bail.

Denial of Constitutional Rights. The writ may be used to attack a conviction under a statute which is claimed to be unconstitutional,[121] or on the ground that the conduct of the trial and the circumstances of the conviction were such as to deny the due process required under the constitution.[122]

Improper Sentence. Habeas corpus will lie where there was a valid conviction or plea of guilty, but a sentence unauthorized in character;[123] not so in case of a merely excessive sentence.[124] Likewise a sentence entered in vacation may be attacked.[125] In such cases the petitioner will, of course, not be discharged, but will be remanded for proper sentencing.

Former Jeopardy. Under our constitution no person's life or liberty shall be twice placed in jeopardy for the same offense.[126] Accordingly where one has been acquitted by a jury and the trial court undertakes to set aside the verdict because of irregularities, habeas corpus will lie to release the accused from such illegal restraint.[127]

Review of Committing Magistrate. The judgment of a justice of the peace, committing one accused of a crime, is not conclusive and hence where an indictment has not yet been returned, a habeas corpus court has the power to inquire into the evidence under which the accused was committed by the magistrate, and to discharge him if it is insufficient.[128] How-

---

[117]Kelly v. Douglas, 164 Miss. 153, 144 So. 237 (1932).
[118]*Ex parte* Golding, 148 Miss. 233, 114 So. 385 (1927).
[119]*Ex parte* Jefferson, *supra* note 80.
[120]*In re* Caples, 58 Miss. 358 (1880).
[121]Donnell v. State. *supra* note 9.
[122]See note 18 *supra.*
[123]White v. State, 58 So.2d 510 (Miss. 1952); see note 86 *supra.*
[124]See note 86 *supra.*
[125]White v. State, 58 So.2d 510 (Miss. 1952).
[126]MISS. CONST. art. 3, § 22; MISS CODE § 2434 (1942).
[127]See note 105 *supra.*
[128]*Ex parte* Oliver, 127 Miss. 208, 89 So. 915 (1921); *Ex parte* Tillman, 111 Miss. 664, 71 So. 910 (1916).

ever, the accused should be required to exhaust his remedies before the magistrate prior to any hearing of the matter on habeas corpus.[129]

Contempt Proceedings. One imprisoned for contempt of court cannot be released on habeas corpus, except for lack of jurisdiction of the court committing for such contempt.[130] The proper remedy for an improper contempt judgment is an appeal to the Supreme Court.[131]

Revocation of Suspended Sentence. Where a sentence or a part thereof is suspended by the trial court, and the suspension is later revoked for misconduct of the defendant, there is no appeal from the order revoking the suspension.[132] If the revocation proceedings are improper, the only attack is by habeas corpus.[133] Such attack may be made where there was a failure to give notice to the defendant or to provide him with a public hearing.[134] And if no substantial evidence was introduced in support of the revocation, the order is subject to attack.[135] It is not necessary on the revocation hearing that the state prove beyond reasonable doubt that the defendant violated the conditions of his suspension,[136] but only that there be "competent, relevant, and material evidence of a substantial nature before the court."[137]

Other Matters. Habeas corpus has been used to attack imprisonment for non-payment of a fine, where the board of supervisors had not provided a method for working out the fine as provided by statute.[138] One convicted and sentenced cannot on habeas corpus obtain his release on grounds of health, since this is a matter purely of executive clemency.[139] Where a conviction has been reversed and the cause remanded to the circuit court, that court again has exclusive jurisdiction and the prisoner cannot be released on habeas corpus.[140]

Right to Bail

The matter of bail presents some peculiar problems not encountered in other criminal proceedings. There is a constitutional right to bail in all cases before conviction, except capital offenses when the proof is evident

---

[129]Wall v. Quin, 148 Miss. 335, 114 So. 744 (1927).
[130]Robbins v. Waldrop, *supra* note 56; *Ex parte* Adams, *supra* note 102.
[131]Miss. Code § 1152 (1942).
[132]Cooper v. State, 175 Miss. 718, 168 So. 53 (1936).
[133]Kittrell v. State, 201 Miss. 514, 29 So.2d 313 (1947).
[134]Mason v. Cochran, 209 Miss. 163, 46 So.2d 106 (1950).
[135]See note 132 *supra.*
[136]See note 78 *supra.*
[137]Shook v. State, 212 Miss. 472, 54 So.2d 728 (1951).
[138]Morris v. Waldrop, *supra* note 34. An express decision was not made in this case, since the facts showed that even at maximum rate permitted by law the petitioner had not been imprisoned enough days to completely pay the fine and costs.
[139]*Ex parte* Chain, 210 Miss. 415, 49 So.2d 722 (1951).
[140]Boudreaux v. State, 176 Miss. 840, 170 So. 281 (1936).

or presumption great, and such bail shall not be excessive.[141] Accordingly, before conviction the accused can always seek bail on habeas corpus.[142] And where bail has been granted but is excessive, a habeas corpus court will reduce the bail to a reasonable amount, based on actual evidence as to the condition of the petitioner to give bond, the nature and character of the offense charged, and the maximum punishment which may be inflicted therefor.[143]

After conviction of a felony, and pending appeal, the statute names specifically the judges or courts which can grant bail, and hence in such instances a habeas corpus court has no authority to admit to bail.[144]

One of the most difficult and frequent problems brought upon habeas corpus is the granting of bail in capital cases, both before and after indictment. The question usually is whether, as a matter of fact, "the proof is evident or presumption great." The rule has been stated to be that ". . . if a well founded doubt of guilt can even be entertained, then the proof cannot be said to be evident nor the presumption great, and in such case bail must be granted."[145] Even where the proof is evident and the presumption great, the judge may in his own sound discretion and under extraordinary circumstances admit to bail in a capital offense, such as serious and probably fatal injury to health[146] or where there is protracted delay on the part of the state in bringing the prisoner to trial.[147]

The fact of a mistrial should be considered as evidence bearing on the right to bail in such cases, and may constitute such a change in circumstances as to give the prisoner a right to a second hearing on habeas corpus; however, a mistrial does not automatically entitle one charged with a capital offense to obtain bail.[148]

The decision of the trial court granting or denying bail will be upheld on appeal unless there is manifest error.[149] If such error is made, the Supreme Court will reverse, and may deny bail erroneously granted by the trial court,[150] or may grant and set the amount of bail where erroneously denied by the trial court.[151] A habeas corpus judgment granting or deny-

---

[141]MISS. CONST. ART. 3, § 29.
[142]Parker v. Tullos, 150 Miss. 680, 116 So. 531 (1928).
[143]*Ex parte* Oliver, 127 Miss. 208, 89 So. 915 (1921).
[144]MISS. CODE § 1180 (1942); Leggett v. Vannison, 133 Miss. 22, 96 So. 518 (1923); Marley v. State, 109 Miss. 169, 68 So. 770 (1915).
[145]*Ex parte* Bridewell, *supra* note 27.
[146]*Ibid.; Ex parte* Pattison, *supra* note 25.
[147]*Ex parte* Bridewell, *supra* note 27; see note 120.
[148]Russell v. Crumpton, *supra* note 56; *Ex parte* Pattison, *supra* note 25.
[149]Stokes v. Terrell, 154 Miss. 230, 122 So. 470 (1929).
[150]*Ex parte* Vinson, 192 Miss. 507, 6 So.2d 114 (1942).
[151]See note 142 *supra.*

ing bail is conclusive unless reversed,[152] or until the happening of some new event which of itself will furnish ground for granting bail.[153]

Extradition Proceedings

The interstate extradition of criminals is governed by the Constitution and laws of the United States.[154] The state laws on the subject are merely to provide means and facilities for carrying out extradition.[155] The usual procedure is that the governor of the demanding state obtains a copy of the indictment or affidavit charging "treason, felony or other crime," certifies it as authentic, and presents it to the governor of the asylum state with his demand for the accused as a fugitive from justice. The governor of the asylum state has the duty of investigating by whatever evidence he may wish, first, whether the extradition papers are in order, and, second, whether the accused actually is a fugitive from the justice of the demanding state. When satisfied on these two points he shall issue a warrant for the arrest of the accused and his delivery to the appointed agent of the demanding state.[156]

It is well settled that the action of the governor may be attacked on habeas corpus, but the exact scope of the inquiry has always been a difficult one. The federal decisions are, of course, controlling. The warrant of the governor is prima facie evidence of a proper compliance with the requisites therefor,[157] but the accused may on habeas corpus attack the governor's action. He may attack the sufficiency of the executive warrant or any other of the extradition papers or proceedings,[158] or he may show that the governor actually did not have an affidavit or indictment before him on issuing the warrant.[159] Minor irregularities will not void the extradition proceedings,[160] and any defect may be cured by admission of the accused.[161] The habeas corpus court may inquire into whether the accused was in the demanding state at the time of the crime, and hence whether he is actually a fugitive from justice.[162] Except for the one fact of whether he

---

[152]Miss. Code § 2836 (1942).

[153]*Ex parte* Hamilton, *supra* note 25; *Ex parte* Atkinson, *supra* note 5. But note holding in *Atkinson* case that different rule obtains if request for bail made under § 1180 of Code, the action of the lower court not being conclusive under that section.

[154]U. S. Const. art. IV, § 2, cl. 2; 18 U.S.C.A. § 3182.

[155]Miss. Code §§ 3981, 3982, 3984, 2816 (1942).

[156]For discussions of extradition laws and procedures, see Bishop v. Jones, 207 Miss. 423, 42 So.2d 421 (1949), and *Ex parte* Walters, 106 Miss. 439, 64 So. 2 (1914).

[157]Grace v. Dogan, 151 Miss. 267, 117 So. 596 (1928); *Ex parte* Walters, *supra* note 156; *Ex parte* Devine, 74 Miss. 715, 22 So. 3 (1897).

[158]Bishop v. Jones, *supra* note 156.

[159]See *Ex parte* Devine, *supra* note 157.

[160]Tyler v. Pierce, 61 So.2d 309 (Miss. 1952); Grace v. Dogan, *supra* note 157.

[161]Loper v. Dees, 210 Miss. 402, 49 So.2d 718 (1951).

[162]Bishop v. Jones, *supra* note 156. This represents a change in the rule since the decision in Grace v. Dogan, *supra* note 157.

was actually in the demanding state, the habeas corpus court cannot inquire into the guilt or innocence of the accused.[163]

Any doubts as to the sufficiency of extradition proceedings should be resolved in favor of the governor's order.[164] If the evidence is contradictory as to the presence of the accused in the demanding state, then he should be returned to that state for a trial of that question on the merits.[165]

For the purpose of extradition an accused may be arrested without a warrant and may be detained a reasonable time so that extradition can be effected.[166] There is no provision for bail after issuance of the extradition warrant, but the accused may be released on bail while under preliminary process.[167]

Extradition may be used to return an escaped convict as well as one merely charged with a crime.[168]

In case proceedings are not in order, it is proper for the habeas corpus court to grant a continuance for the purpose of obtaining proper papers, and the court should retain jurisdiction for the purpose of passing on the sufficiency of new papers.[169]

Custody of Minors

Under our statutes the writ of habeas corpus extends not only to detention by which one is deprived of his liberty, but also by which "the rightful custody of any person is withheld from the person entitled thereto."[170] Accordingly, habeas corpus is a proper and much used remedy for determining the custody of minors, and is in fact the only remedy except in cases where divorce or separate maintenance is decreed.[171] Most of the cases involve the general substantive principles as to the custody of minors, and are necessarily outside the scope of this article.[172]

The habeas corpus court must, of course, have territorial jurisdiction of the child.[173] Habeas corpus will not lie if another court has taken and

---

[163]Tyler v. Pierce, 61 So.2d 309 (Miss. 1952) (denial of guilt; "settlement" of charge); Jones v. Wetzel, 60 So.2d 781 (Miss. 1952) (self defense; motive for prosecution); Ullom v. Davis, *supra* note 7; (motive for prosecution; sufficiency of indictment under laws of demanding state).

[164]Tyler v. Pierce, *supra* note 163.

[165]*Ex parte* Walters, *supra* note 156.

[166]See note 161 *supra*.

[167]*Ex parte* Wall, 84 Miss. 783, 38 So. 628 (1904); Miss. Code §§ 2577-2582 (1942).

[168]See note 161 *supra*.

[169]Bishop v. Jones, *supra* note 156.

[170]Miss. Code § 2815 (1942). Before the statute was so extended, it was held in Foster v. Alston, 7 Miss. 406 (1842), that habeas corpus was not a proper remedy where a child was not restrained against his will.

[171]Payne v. Payne, *supra* note 100; Amis, Divorce and Separation in Mississippi § 225 (1935).

[172]For a full discussion of this subject see Amis, *op. cit. supra* note 171, §§ 211-221.

[173]Steele v. Steele, 152 Miss. 365, 118 So. 721 (1928); Haynie v. Hudgins, *supra* note 22.

properly retained jurisdiction of the child's custody. Accordingly, where custody has been awarded in a divorce proceeding, the court retains jurisdiction and custody may not later be changed on habeas corpus;[174] but if the divorce is denied,[175] or if the divorce decree does not award custody,[176] then the matter is open to be considered later on habeas corpus. Likewise, where a guardian has been appointed by the chancery court, jurisdiction is retained and custody of the child may not be taken from the guardian in habeas corpus proceedings;[177] a logical exception is the case where the guardian is appointed without notice to the parents[178] or to one *in loco parentis,*[179] in which cases the appointment is not a bar to a habeas corpus proceeding by the parent or one *in loco parentis.* Where custody is awarded on habeas corpus, such award is res judicata and may not be re-opened in a subsequent divorce proceeding.[180]

Although an award on habeas corpus is res judicata as to conditions at that time, it may of course be reconsidered on another habeas corpus petition or other custody proceedings if circumstances have changed.[181] Likewise, even though a decree in another state is res judicata, the matter of custody may be considered by the courts of this state if conditions have changed since the earlier decree.[182]

As a general rule, when the habeas corpus court enters an order freeing a person from restraint or awarding his custody to the party entitled thereto, the court's jurisdiction of the matter is at an end, and this general rule has been applied to the awarding of custody of a minor.[183] In a more recent case, however, involving "a petition in the nature of a habeas corpus" before a chancellor, where it was argued that the chancellor lost jurisdiction after the original award on habeas corpus, the Mississippi Supreme Court held that the chancellor could retain jurisdiction of the custody matter, stating that the argument as to loss of jurisdiction

> ". . . might have merit in a strictly legal habeas corpus matter involving merely the unlawful detention of a petitioner. It has no merit in a chancery court where the petition, while in the nature of a petition for writ of habeas corpus, is much broader than a mere legal petition involving unlawful detention, but which peti-

---

[174]Hinman v. Craft, 204 Miss. 568, 37 So.2d 770 (1948).
[175]Miles v. Miles, 111 Miss. 110, 71 So. 295 (1916).
[176]Payne v. Payne, *supra* note 100.
[177]Herndon v. Bonner, 97 Miss. 328, 52 So. 513 (1910).
[178]Sinquefield v. Valentine, *supra* note 10.
[179]Britt v. Allred, 199 Miss. 786, 25 So.2d 711 (1946).
[180]Campbell v. Campbell, *supra* note 25; Leggett v. Leggett, 202 Miss. 435, 32 So.2d 189 (1947). Note that the latter case was an award of custody by a circuit judge.
[181]Campbell v. Campbell, *supra* note 25; Watts v. Smylie, *supra* note 25.
[182]See note 14 *supra.* Haynie v. Hudgings, *supra* note 22.
[183]Gray v. Gray, 121 Miss. 541, 83 So. 726 (1920).

> tion itself, as in this case, goes far beyond such strictly legal petition and raises the issue of the best interest of the child, and who should have its custody, and the obligation of the parents. The technical name given the pleading is immaterial."[184]

This decision indicates that in matters concerning custody of minors, it is probably desirable to file the habeas corpus petition before the chancellor rather than the circuit or county judge.[185]

Miscellaneous Uses

The Code of 1857 and previous codes provided for the use of habeas corpus for the recovery of possession of slaves, and many of the earlier cases arose under these provisions.[186]

The writ is a proper method of obtaining custody of insane persons and has been used respectively by the sheriff and the mental hospital attempting to obtain custody from each other.[187]

Habeas corpus has been used by parents in an attempt to obtain custody of their minor son who had enlisted in the Mississippi National Guard without their consent.[188]

The statute provides for use of habeas corpus to bring a convict before the circuit for resetting of the execution date where for some reason the original date for execution of death sentence has passed.[189]

Under earlier statutes, a county contractor was allowed to use habeas corpus to get possession of a convict from the sheriff.[190]

The sheriff can use the writ of habeas corpus to obtain custody of a prisoner from the sheriff of another county, to which the prisoner has been removed for safekeeping, pursuant to proper orders of the court having jurisdiction of the prisoner.[191]

---

[184]Leggett v. Leggett, *supra* note 180. Wallace v. Wallace, 93 Miss. 278, 46 So. 398 (1908), the chancellor's action retaining jurisdiction in habeas corpus proceedings was affirmed without discussion; in Reynolds v. Davidow, 200 Miss. 480, 27 So.2d 691 (1946), this question was raised without being decided.

[185]See Haynie v. Hudgins, *supra* note 22, and Hinman v. Craft, *supra* note 174, where custody matters were transferred from circuit judge and county judge respectively to the chancellor.

[186]Miss. Code, c. 48, § 5 (1857); Nations v. Alvis, *supra* note 22; Scudder v. Seals, 1 Miss. 154 (1824).

[187]Mabry v. Hoye, 124 Miss. 144, 87 So. 4 (1921); Hoye v. State, 169 Miss. 111, 152 So. 644 (1934).

[188]Birdsong v. Blackman, *supra* note 52. Relief was denied, the case being distinguished from those involving armed forces of the United States on ground Mississippi statute did not require consent of parents for enlistment as did federal statute.

[189]Miss. Code § 2559 (1942).

[190]Matthews v. Walker, 57 Miss. 337 (1879).

[191]Wray v. Kelly, 98 Miss. 172, 53 So. 492 (1910). In this connection, see Miss. Code § 2500 (1942), which provides against removal of prisoner from his place of confinement into custody of any other officer, except by writ of habeas corpus and certain other exceptions.

WRIT OF INQUIRY

*Walter R. Bridgforth**

The writ of inquiry, developed by the common law as an aid to the courts in discharging their functions, is described as follows:

> "A writ sued out by a plaintiff in a case where the defendant has let the proceedings go by default, and an interlocutory judgment has been given for damages generally, where the damages do not admit of calculation. It issues to the sheriff of the county in which the venue is laid, and commands him to inquire, by a jury of twelve men, concerning the amount of damages. The sheriff thereupon tries the cause in his sheriff's court, and some amount must always be returned to the court. But the return of the inquest merely informs the court, which may, if it choose, in all cases assess damages and thereupon give final judgment."[1]

Without exception, decisions of the Supreme Court of Mississippi concerning writs of inquiry have turned upon an application of the Mississippi statute now appearing as Section 1547, Code of 1942.[2] This section first appeared as Article 253, Chapter 61, Code of 1857. Though the phraseology of the statute has been modified through the years, it was not substantially amended prior to the passage of Chapter 332, Laws of 1950, when the italicized word and phrase were inserted. The statute determines the cases in which it shall be necessary that the writ issue.

Most of the cases before the Supreme Court of this state involving writs of inquiry have turned upon the question of whether or not, under the terms of the statute, it was necessary that a writ be issued. In most of the cases it is interesting to note that the Supreme Court reversed trial courts for the reason that final default judgments were taken, unsupported by writs of inquiry, in actions which did not come within the statute. The earliest of these cases coming to the writer's attention is that *Barker v. Justice*,[3] where the Court, referring to a count for money paid, stated as a dictum that, there being no copy of any account or bill of particulars filed with the Court, a default judgment could not have been effective for the reason that there must have been a writ of inquiry, without which a default judgment could have been of no benefit to the plaintiff.

---

*Member firm of Bridgforth & Love, Yazoo City, Miss.

[1] BOUVIER'S LAW DICTIONARY (14th ed.).

[2] "... And in all actions where the sum due does not so appear, and in all actions sounding the damages, if the defendant do not plead, interlocutory judgments may be taken, on which writs of inquiry shall be awarded, which may be executed at the same term *either* by the jurors attending court *or by the judge, at the option of the plaintiff*. And after a writ of inquiry shall be executed, and judgment rendered thereon by the court, the same shall not be set aside unless good cause be shown therefor on oath; and in such case the defendant shall plead immediately, and the plaintiff shall not thereby be delayed of his trial." (Italics added.)

[3] 41 Miss. 240, 246 (1866).

The next case reported, *Mississippi Central Railroad Company v. Fort,*[4] involves a novel situation. Suit was brought in assumpsit for the value of cattle and hogs killed and destroyed by the negligent conduct of the railroad company. With the declaration was filed a schedule of the several animals killed or injured, set up in the form of an account with the value of each animal shown. A default judgment was taken for the total value of the animals. The Court stated that the appropriate form of action for the injuries was trespass and not assumpsit. The gravamen of the suit was said to be the negligent conduct of the company's agent, and the fact that the plaintiff stated in the schedule the value of the animals, headed with a charge of indebtedness, did not impart to the schedule the characteristic import of "open account" referred to by the statute. The assignment of error, that the default judgment was rendered without a writ of inquiry, was sustained.

In *Boykin v. State of Mississippi,*[5] the third case reported, we find a case similar to other more recent decisions,[6] where a declaration, not founded on an instrument of writing showing the sum due or on an open account with a copy filed with the declaration, was relied upon to support a default judgment entered as final without a writ of inquiry. In this case, a sheriff was sued on his official bond for his failure to collect and pay to the state treasury certain tax monies. The declaration asked, in addition to said monies, damages at the rate of 30 per cent per annum, and contained, as an exhibit to the declaration, the bond and a certified statement of the auditor. A final default judgment was taken for the sum certified by the auditor, increased by the penalty. The Court found the amount of taxes due the state from the collector was the total charged to him by the auditor, for which judgment should have been given with 30 per cent per annum damages, after deducting all legal allowances; that to determine

---

[4] 44 Miss. 423 (1870).

[5] 50 Miss. 375 (1874).

[6] Neshoba County v. Philadelphia, 172 Miss. 326, 160 So. 730 (1935), was an action brought by the city against the county for certain ad valorem taxes claimed to be due the city; in the trial of the suit the city acknowledged that the municipality was entitled to only those taxes collected after Nov. 1, 1930, and the Supreme Court found that a writ of inquiry should have been issued to determine the taxes collected after that date. Stepp v. Stephenson, 146 Miss. 468, 111 So. 747 (1927), involved a suit brought for the actual value of certain pine trees, together with the statutory penalty, and a default judgment was taken; on appeal the judgment was reversed for the reason that actual damages from the cutting of the trees was a matter that required proof and an assessment by the jury under a writ of inquiry before final judgment for plaintiff could be properly rendered. Allison & Hyde v. Williams, 142 Miss. 825, 108 So. 142 (1926), reversed a default judgment in a suit based on an alleged violation of the Bulk Sales Law where the declaration did not allege the fair market value, but had attached an itemized account; damages being limited to fair market value, it should have been determined under a writ of inquiry. Jenkins v. Wilkerson, 76 Miss. 368, 24 So. 700 (1899), was brought to recover proceeds derived from the sale of cotton; no open account or bill of particulars was filed with the declaration, not founded on an instrument of writing showing the sum due, and default judgment was reversed because a writ of inquiry should have been awarded

the allowances due the collector and to determine the final amount of his obligation a writ of inquiry should have been awarded.

In the recent case of *Beck v. Kersh*[7] we find the one decision where a default judgment was sustained over the appellant's assignment that the court erred in entering judgment without having damages assessed through execution of a writ of inquiry. In this case appellee filed suit seeking recovery of the purchase price of $65.00 for breach of warranty in the sale of an electric refrigerator. A judgment by default was taken against appellant in the circuit court for the amount sued for. The Supreme Court, citing *Mississippi Central Railroad Company v. Fort,* held that Section 1547, providing for writs of inquiry in ". . . all actions where the sum does not so appear, and in all actions sounding in damages, if the defendant does not plead. . . ." only applied:

> ". . . in actions of tort and that it has no application to actions ex contractu where the amount of damages is definite and fixed. The suit here was for a breach of warranty, arising out of contract, and the amount involved was definite and fixed sum. If appellee was entitled to recover anything at all, she was entitled to the amount sued for. It would have been a vain and idle gesture for the court to have awarded a writ of inquiry and impaneled a jury to determine the amount of the recovery. The assignment is therefore without merit."

The *Beck* case involved an action founded on an instrument of writing showing the sum due, and is therefore to be distinguished from the cases above discussed.

The case of *Town of Jonestown v .Ganog*[8] is of interest for the proposition that Section 1547 does not apply to an action for mandamus. Here appellant sought to attack a default judgment granting mandamus on the ground that the judgment, which appellant was attempting to enforce through its mandamus proceedings, was not made an exhibit to the petition seeking the judgment of mandamus. The Supreme Court stated that Section 1547 ". . . has application only in a case where it is sought to recover a money judgment."

The italicized parts of Section 1547 were introducted into the statute by Chapter 332 of the Laws of 1950. Prior to that amendment, because of the nature of the writ of inquiry at common law and because of the terms of Section 1547, many practitioners were of the opinion that a writ of inquiry could only be executed through presentation before a jury of twelve men. Especially in matters before courts of the justice of the peace and county courts, where no jury had been called, attorneys were in

---

[7]208 Miss. 879, 45 So.2d 730 (1950).
[8]97 Miss. 67. 52 So. 579 (1910).

the position of requiring the expense and inconvenience of calling a jury for the purpose of hearing only questions arising under the writ of inquiry or of proceeding outside the proper process of the law to have the writ executed by the judge. This dilemma has now been removed through the amendment of 1950.

In addition to Section 1547, writs of inquiry are provided for in the following sections of Mississippi Code of 1942:

(1) Section 1514, under the chapter on circuit courts, provides that "if the verdict shall omit price or value, the court may at any time award a writ of inquiry to ascertain the same."

(2) Under the chapter dealing with Attachments Against Debtors, it is provided in Section 2714 that if the defendant does not appear and plead to the action, in pursance of notice, ". . . the court, as in other cases, shall give judgment against him by default, and award a writ of inquiry if necessary. . . ."

(3) Sections 2860 and 2861, under the chapter on Replevin, provide that if the plaintiff recover judgment by default or the defendant prevail through failure of the plaintiff to prosecute or through non-suit of the plaintiff, the respective parties may have a writ of inquiry to assess the value of the property or damages, or both, as the case may be.

It might be said that Section 2714 in Attachments Against Debtors and Sections 2860 and 2861 under Replevin deal with extraordinary legal proceedings. The general rule is that "Where a special and particular statute deals with a special and particular subject, its particular terms as to the special subject control over general statutes dealing with the subject in general."[9]

As to Section 2714, the statute says, ". . . The court, *as in other cases,* shall give judgment against him by default, and award a writ of inquiry if necessary . . ." and therefore might be said to write in the terms of Section 1547 as amended. However, Sections 2860 and 2861, under the extraordinary legal proceedings of Replevin, do not contain the phrase "as in other cases," and the question might well be posed whether or not in practices before justice of the peace courts and county courts, where no jury has been called, one may safely have the judge execute a writ of inquiry rather than require that the inquest be made before a jury of twelve men.

---

[9]Griffith, *The New Mississippi Civil Practice Act—Its Background and Effect,* 20 Miss. L. J., 1, 26 (1948).

LUNACY—WRIT DE LUNATICO INQUIRENDO

*Thomas Y. Minniece**

General History of the Writ

The writ de lunatico inquirendo is an old common law writ which was and is now used for the purpose of inquiring concerning the lunacy of an individual. There is a difference of opinion among the courts of this country as to the exact procedure in using the writ under the old common law. This difference of opinion has arisen in the numerous cases in which the contention has been made that the commitment of a person as a lunatic or the appointment of a guardian for an alleged lunatic was void because the alleged lunatic did not have a jury trial.[1] All of the courts seem to agree that the matter was not handled as a regular trial, but was more in the nature of an inquest. The difference of opinion arises on the issue of whether the right to a jury trial was ever abandoned under the old common law. The two positions are best stated in the cases of In re *O'Connor*,[2] and *Sporza v. German Savings Bank*[3]. The California Court contended in their opinion in the *O'Connor* case that under the common law, in its earlier history, the profits of the lands of one found to be a lunatic passed to the crown, and that, therefore, as a protection to property rights, the issue was tried by a jury of twelve men. It further contended that in later common law history, after mental diseases came to be recognized as curable, such proceedings were summarily conducted or prosecuted without the intervention of a jury, due provision being made for the care and preservation of the patient's estate for his benefit while he remained mentally incompetent. The Court of Appeals of New York in the *German Savings Bank* case took the position that forfeiture to the king was always for the benefit of the insane person; that the king as *parens patriae* undertook the custody and care of such persons, and that the seizure of the property was not for the benefit of the crown, but to prevent its dissipation by the lunatic and to use it in the upkeep of the insane person as a ward of the king. According to this Court, the property and person were entrusted to curators who might be either the feudal lord or the next of kin. They were given the custody of the estate under the obligation of applying the profits to the support of the incompetent, retaining the excess to be returned with the estate in case of recovery. The court goes on to state that this duty was afterwards transferred to the lord chancellor, not as a part of his equitable jurisdiction, but as the king's delegate to exercise his special jurisdiction. The Court points out that the legislature

---

*Chancellor, 12th Chancery District, Meridian, Mississippi.
[1] 91 A.L.R. 88-99.
[2] 29 Cal. App. 225, 155 Pac. 115 (1915).
[3] 192 N.Y. 8, 84 N.E. 406 (1908).

in this country has succeeded the king as *parens patriae* in reference to lunatics.

The courts of this country that have considered the matter seem to hold that if the right of trial by jury in proceedings to adjudicate insanity existed under a statute before the adoption of the state constitution, such right is preserved by the adoption of constitutional provisions guaranteeing the right of trial by jury.[4] The courts of this country have uniformly held that the guarantees continued in the Constitution of the United States do not prohibit an adjudication of insanity without the finding of a jury. This conclusion was reached by reasoning that none of the guarantees under the constitution with reference to trials apply to state courts except the Fourteenth Amendment. As to the Fourteenth Amendment, the reasoning was that the due process of law provided for is not of a particular mode, and that that amendment only guarantees that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it.[5] It has also been generally held in this country that statutes providing for a jury trial in sanity cases are not subject to constitutional objections as to the number composing such a jury or as to the number that must unite in a verdict.[6] They also hold that there is no constitutional right to a jury trial in a proceeding to determine whether a person has regained his sanity even where a constitutional right to such trial is recognized in original proceedings to adjudicate insanity.[7] None of these cases discuss the procedure for restoration to sanity under the old common law.

Mississippi Statutes

The use of writs de lunatico inquirendo for appointing a guardian for a lunatic and their use in committing a lunatic to the insane hospital both originated in Hutchinson's Code of Mississippi.[8] The use of the writ de lunatico inquirendo for the appointment of a guardian for an insane person had its origin in the Orphans' Act passed November 26, 1821. At that time no procedure for commitment to an insane hospital existed, there being no such hospital in Mississippi. This section is the forerunner of Section 430 of the Mississippi Code of 1942, and the procedure provided is similar. Under this original act the Orphans' Court was given jurisdiction, and the right to bring the proceedings was placed in friends, relatives, or the overseer of the poor. Instead of merely designating the pro-

---

[4]Note, 91 A.L.R. 88, 93, and cases cited therein.
[5]Simmon v. Craft, 182 U. S. 427 (1901).
[6]Fant v. Buchanan, 17 So. 371 (Miss. 1895), and other cases cited in Note, 91 A.L.R. 88, 97.
[7]91 A.L.R. 88, 98.
[8]Hutchinson's Code (1848) c. 36, art. 1, § 136.

cedure as the issuance of a writ de lunatico inquirendo as does Section 430 of the Code of 1942, the procedure was spelled out. The statute provided for a writ directing the sheriff to summon twelve jurors to make inquisition under their oath. If the person was adjudged to be a lunatic by such inquiry by a majority of the jurors, and incapable of taking care of himself or property, the jury certified said fact to the orphans' court, which appointed some suitable person as guardian.

In the Mississippi Code of 1857[9] the procedure was changed in several respects. The jurisdiction was given to the probate courts, which were the successors of the Orphans' Court, and the statute provided that the court should be satisfied that there was probable ground for the application before it directed the writ to issue. It required further that the jurors be not related to the party. This statute also provided that the jury would make full inquiry by evidence and by examination of the party, if they thought proper.

In the Code of 1871 the statute was further amended to spell out in more detail the steps of the procedure.[10] It provided for jurisdiction in the chancery court or the chancellor in vacation, and that such jurisdiction should be exclusive. It substituted the board of supervisors for the overseer of the poor. It specified that the application should be written. Upon the filing of such application, the court or chancellor directed the clerk to issue the writ to the sheriff. It added as a qualification of the jurors the requirement that none of them be interested in the estate of the alleged lunatic. It eliminated the requirement for a finding of probable cause. In addition to having the party brought before them, the jury was required to take the statement under oath of such friends and neighbors as could be conveniently produced and opinions under oath of such medical men of the vicinity as could be brought before them. It specifically gave the rights of subpoena and attachment for witnesses to the jury. It provided that a majority of the jury should decide the question, and if they were equally divided, the jury should be discharged and another one empaneled. Upon the finding of the jury, those concurring wrote their verdict on the process, signed it, and returned the papers to the clerk who issued the writ. If a person was found to be a lunatic, the court or chancellor in vacation appointed a guardian. This statute specifically gave the nearest relation preference in the appointment of a guardian.

The Code of 1880 reduced the number of jurors to six, required a finding of probable cause by the court for the issuance of the writ and dropped the requirement that none of the jurors be interested in the

---

[9]C. 60, art. 155.
[10]Sections 1233-1241.

estate of the alleged incompetent.[11] The directions to the jury under this section are not set out in detail as in the previous code, but the general effect of the two acts in that respect is the same.

In the Code of 1892, Section 2212, the statute appeared exactly as it did under Section 430 of the Code of 1942, having been carried forward in all the intervening codes.[12] The procedure under the writ was not specified at all, but the statute simply provided that the court might appoint guardians to persons adjudged upon inquisition to be of unsound mind, and if the person had not been so adjudged, the court, chancellor or clerk should issue a writ de lunatico inquirendo to be executed and returned, as required by law. By that time, the procedure under writs de lunatico inquirendo, both for the appointment of guardians and the commitment to an insane hospital, had been well established in our jurisprudence.

The procedure for commitment to an insane hospital was set up by the Mississippi Legislature on March 4, 1848, as part of an act to establish a lunatic asylum.[13] In addition to setting aside five acres of land and $10,000 as an appropriation to build an asylum in Jackson and providing that bricks for the building should be made by the labor of convicts in the penitentiary, Paragraph 7 of the act provided the procedure under which patients could be committed to said asylum as soon as it was ready for occupancy. This section provided for placement in an asylum by the voluntary act of friends or relations of the patient, subject to the rules and regulations that would be set up by the board of directors of the asylum. It then provided that if the friends or relations of the lunatic neglected or refused to put the patient in the asylum, and let the patient go at large, it was the duty of the probate court of the lunatic's residence or where he might be found going at large, on the suggestion in writing of any citizen, to issue the writ of lunacy. The writ was directed to the sheriff and was handled in practically the same manner as under the original Act of 1821 with reference to the appointment of a guardian. The sheriff summoned the twelve men to make the inquisition on oath and return it to the court. If a majority of them adjudged the patient to be insane, the court ordered the sheriff to arrest the lunatic and confine him in the asylum.

In the Code of 1857 the procedure for commitment to the insane asylum remained substantially the same.[14] By the Code of 1871 the commitment procedure was put in the hands of the chancery court instead of the probate court.[15]

---

[11]Section 2118.
[12]Miss. Code § 2430 (1906); Hemmingway's Code § 1991 (1917); Miss. Code Ann. § 1894 (1930).
[13]Hutchinson's Code (1848) c. 14, art. 17.
[14]C. 12, art. 13.
[15]Section 2094.

In the Code of 1880 the number of jurors was reduced to six.[16] Also, for the first time the legislature provided for issuance of a summons for the alleged lunatic. No particular time was specified, however.

By the Code of 1892 it was provided that the chancery courts were to have jurisdiction of such writs and jurisdiction was to be exercised by the clerks at any time, subject to the approval of the court.[17]

There was no material change in the procedure for commitment after the Code of 1892 until the passage by the legislature of Chapter 231 of the Laws of 1940,[18] which amended the law in two material respects. The number of jurors was reduced from six to three. The law provided that when the application was made by a citizen, before the writ of lunacy was issued to the sheriff, the county health officer or in his absence or inability to perform the duties, a competent, licensed and practicing physician must examine the alleged lunatic and file with the clerk his opinion as to whether or not the lunatic should be adjudged insane and committed to an insane asylum. If the opinion was that the alleged lunatic should be so adjudged, then the writ was to be issued to the sheriff as provided in previous codes, and the procedure was handled as in previous codes, except for the number of jurors.

With the study of the procedure under writs de lunatico inquirendo, the procedure for commitment by certificates of physicians and one citizen should be noticed, since this provision is substantially incorporated in our present law with reference to commitment of insane persons to our mental hospitals. This provision as contained in Section 6917, Mississippi Code of 1942, has been carried forward in materially the same language since the Code of 1892.[19] The codes provided that the superintendent and trustees might admit patients to the insane asylums on application made on behalf of a lunatic if they deemed it proper, even though he had never been adjudged a lunatic. Those statutes provided further that if he was, in fact, insane, they should have authority to detain him, but in all such cases, they acted at their peril if the person was sane. The law required that before admission the person making the application should furnish a certificate from two licensed practicing physicians and one respectable citizen who was personally acquainted with the insane person, all of whom should be residents of the same county of the insane person. Section 2091 of the Code of 1871 and Section 661 of the Code of 1880 provided simply that the superintendent and board of trustees might admit an

[16]Section 663.
[17]Section 2835.
[18]Miss. Code §§ 3219-3222 (1906); Hemmingway's Code §§ 5561-5564; Miss. Code Ann. §§ 4576-4579 (1930).
[19]Miss. Code Ann. § 4584 (1930); Hemmingway's Code § 5569 (1917); Miss. Code 2843 (1892); Miss. Code § 3227 (1906).

insane person on application filed in his behalf if they thought the patient should be admitted. The other provisions with reference to such admissions were added in the codes after 1880. A like procedure for admission was set forth in the Code of 1857,[20] except that it required a bond from the person making application for the payment of such a sum as might be agreed upon for the maintenance and care of such lunatic while in the asylum, and for the lunatic's removal thereto and therefrom, when necessary. It also provided for the admission of persons acquitted of crimes and misdemeanors on the grounds of insanity, as did the Code of 1871.[21]

In 1948 the legislature made an attempt to consolidate all of the sections with reference to insanity and other mental afflictions and the appointment of guardians for persons *non compos mentis* into one act.[22] Into this act some drastic changes in procedure were introduced. The provisions for trial by jury were abolished altogether, and the act provided for examination by two physicians with the final decision to be made by the psychiatric staff of the asylum at Whitfield. The manner of making the application for adjudication was not changed, but the entire procedure from that point on was changed. Since this law was in effect for only about two years and the general procedure is similar to the present law, a complete analysis of those provisions would serve no real purpose. There were several defects in that act and it caused a great deal of confusion among members of the Bar. One of the principal defects was a provision that if the psychiatric staff at Whitfield found the person to be insane, he and his relatives were then notified and a second hearing was had before the clerk. Since the patient was almost invariably already in the hospital, this created a difficult situation. The provision for admitting patients on doctors' certificates without a formal adjudication was incorporated in this act as Section 11. For the first time since the Code of 1880 it was not provided that they should have the authority to detain him only if he was, in fact, a lunatic and acted at their peril if he was sane. Also, the requirement that a citizen join the two doctors in their certificate was dropped. The provision was added, however, that the admission had to be approved by the psychiatric staff of the hospital, and that anyone committed under that section should have the right to an appeal and hearing before the chancery court, and his relatives could make an appeal.

Mississippi Cases

There have been relatively few cases dealing with writs de lunatico inquirendo decided by our appellate courts. Since the more numerous are

---

[20]C. 12, art. 10.
[21]Section 2091.
[22]Laws of 1948, c. 394.

those dealing with the question of the effect of an adjudication under a writ de lunatico inquirendo in a case in which the person adjudged incompetent is sought to be tried in circuit court for a felony, that group of cases will be first discussed. In 1920 it was determined in the case of *Mabry v. Hoye*[23] that where a person had been duly adjudged to be insane under Section 3219, Code of 1906, and was indicted for murder after his adjudication as a lunatic, the superintendent of the East Mississippi Insane Hospital was entitled to his custody on a habeas corpus hearing as against the sheriff of the county where he was indicted. The testimony in that case showed that the person in question was still insane at the time of the habeas corpus hearing. This holding was later qualified in the cases of *Hoye v. State*[24] and *Byrd v. State*,[25] in which it was held that even though a person had been committed to an insane hospital by adjudication under a writ de lunatico inquirendo, if the hospital voluntarily allowed him to leave or took no action to recover his possession for a period of several months, the court on the habeas corpus hearing might be warranted in finding the person sane, and that the action of the hospital authorities amounted to a discharge. In *Hawie v. Hawie*[26] it was held that where the sanity of a convicted murderer was later questioned on petition for a writ of error coram nobis, and the jury found him insane, the circuit court had acquired exclusive jurisdiction over him. The Supreme Court held that the proper procedure was to remand him to prison during his incapacity, and that the chancery court had no right to then entertain proceedings under a writ de lunatico inquirendo.

The case of *Fant v. Buchanan*[27] is the oldest recorded case involving writs de lunatico inquirendo decided in Mississippi. Although it is very important in that it is the only recorded case in Mississippi passing on the constitutionality of the procedure, it was not officially reported. The case involved a suit in circuit court by one Fant against Dr. Buchanan, superintendent of East Mississippi Insane Asylum, for damages for false imprisonment. Fant had been confined in the asylum under an order of the Chancery Court of Noxubee County. A demurrer to the plea of Dr. Buchanan setting up said order was overruled by the lower court and affirmed by the Supreme Court. The plaintiff contended that Section 2835 of the Code of 1892 was unconstitutional because it violated the Fourteenth Section of the Bill of Rights of the Constitution of 1890 and the Fourteenth Amendment of the Constitution of the United States. According to the report of the case, the only point raised was that the law deprived

---

[23]124 Miss. 144, 87 So. 4 (1920).
[24]169 Miss. 111, 152 So. 644 (1934).
[25]179 Miss. 336, 175 So. 190 (1937).
[26]128 Miss. 473, 91 So. 131 (1922).
[27]See note 6 *supra*.

the plaintiff of life, liberty or property without due process of law. However, the special judge in his opinion discussed the guarantee of the right of trial by jury.[28] The Court disposed of the question of due process of law by stating that due process of law does not guarantee a jury trial. The real basis of the Court's decision seems to be found in their holding that the guarantee of a jury trial did not require a jury of twelve. The reason given for such holding was that, when the Constitution of 1890 was adopted, the practice in such inquests, as provided for by the Code of 1880, was to use a jury of six men, and since in the case in question plaintiff had been confined under such a procedure his constitutional rights were not violated. However, the Court went further and made the following statement:

> "The provision 'the right of trial by jury shall remain inviolate' must be read in connection with the grant of full jurisdiction to the chancery court to which a jury does not ordinarily belong and must be held to be qualified by such grant so as to leave to the legislature to provide for a jury or not in the chancery court in its discretion. The legislature in regulating the exercise of its jurisdiction by the chancery court, to which a jury does not belong except as specially provided by legislation, might dispense with a jury or prescribe any number it pleased without violating any provisions of the constitution."

Further comment on this case in connection with the constitutionality of our present law will be found later in this article.

In the case of *Baum v. Greenwald*[29] the court discussed at length the procedure under writs de lunatico inquirendo. However, since the Supreme Court decided the case on the basis of the fact that the evidence did not show insanity, most of the opinion is dicta. Proceedings were brought against Mrs. Baum under Section 3219 of the Code of 1906. The parties provided a stenographer to transcribe the testimony. When the jury found Mrs. Baum insane, her attorney moved for a new trial and was overruled by the clerk, and a bill of exceptions was taken embodying all the evidence as transcribed by the stenographer. At the succeeding term of chancery court, Mrs. Baum resisted the approval of the clerk's order. The chancellor approved the order of the clerk for the appointment of a guardian for the estate of Mrs. Baum, but set aside the order for the appointment of a guardian of her person. On appeal, the Supreme Court, in reversing the decree on the grounds that the evidence did not show that Mrs. Baum was incapable of taking care of her property, discussed procedure at length. They went into the two different procedures for

---

[28]MISS. CONST. ART. III, § 31.
[29]95 Miss. 765, 49 So. 836 (1909).

determining sanity, and said that Section 3219 of the Code of 1906 dealt with the general subject of lunacy and provides the procedure to be followed for determining the sanity of a person, whether the proceeding is under Section 2430 for the purpose of procuring an appointment of a guardian alone or under Section 3219 for the general purpose of having the party declared insane and confined. In this connection, it should be noted that the Code of 1906 no longer spelled out the procedure for a writ de lunatico inquirendo, but merely stated that the writ should issue before the appointment of a guardian, if no previous adjudication of insanity had been had. The Court further pointed out that Section 3219 was a summary power to be exercised by the clerk of the chancery court at any time, subject to the approval of the court always, and that the procedure under Section 2430 was to be exercised by the court or the clerk. They also stated that the clerk under Section 3219 had no power to set aside the verdict of the jury, but only to enter a decree as a result of their findings. The Court said it was not necessary to take down the testimony, but since it was done it constituted a part of the proceedings and could be considered by the chancellor when the matter came up on the motion for approval. They held that if an objection was made to the approval of the act of the clerk, the lower court could hear new evidence which might be offered as to why the clerk's act should be approved or disapproved. The court made the statement that only a jury of six freeholders could declare a person to be of unsound mind, but that the court must approve this finding before it becomes final.

The Court pointed out that under Section 2430 the proceedings had to be initiated by a relative or friend or, if they neglected to do so, by a member of the board of supervisors, but that under Section 3219 any citizen could initiate the proceedings if the relatives or friends failed to do so. The court indicated that a greater degree of proof might be required under Section 2430 than under Section 3219. The theory set forth by the Court was that, where the safety of the public was involved, the jury might be warranted in resolving doubts in favor of the protection of the community, but that, when it came to the matter of a guardian for their person or estate, no person's property or liberty of action should be interfered with except upon the clearest and most indisputable proof of unsoundness of mind and inability to care either for himself or for his property.

It is hard to follow the Court's reasoning in this respect. It seems to the writer that it is just as bad, even worse, to confine a person in an insane asylum as it is to place his property and person under the care of a guardian. Furthermore, inasmuch as Section 2430 provided specifically that a guardian of the property could be appointed by mere petition if the person had already been adjudged of unsound mind, it would seem that

the legislature did not contemplate any difference in the degree of proof required by the two sections.

In a short opinion in the case of *Muse v. Muse*[30] our Supreme Court held that there was no statute conferring upon the nearest of kin of an adjudged lunatic the legal right to have the guardianship of such lunatic. In this connection it should be noticed that under the Code of 1871 relatives were specifically given such right.[31] However, the Court in this case was considering the matter under Section 2212 of the Code of 1892.

The case of *Dana v. Zerkowsky*[32] is interesting, not only because it is one of the cases concerning the famous Natchez "Goat Castle," but because of its legal aspects. The suit was to quiet title to property which had been foreclosed in chancery court in an earlier action. A guardian had been appointed for Dana and had executed the deed of trust involved for necessary purposes. The record showed that when Dana was adjudged insane, no process had been served upon him as required by Section 4576 of the Code of 1930.[33] In the proceedings to foreclose an objection was filed to confirmation of the sale, alleging that Dana was of sound mind and, if otherwise, had never been legally so adjudged; that the appointment of the guardian was unauthorized, and all of her acts were void. There was no appeal from the action of the lower court in ordering the foreclosure, and according to the brief of counsel objections to the confirmation of the sale under the foreclosure were withdrawn. The Court held that the decree in the suit to foreclose was res judicata; that if Dana was actually sane at that time, the proceedings were regular and final and he was properly summoned individually, and also appeared and resisted the entry of the final decree on the same grounds as in the case being considered. The Court said that if he was actually insane, even though his guardian was improperly appointed, she was at least invested with the capacity of a guardian ad litem or next friend, and that more importance should be given to the fact that Dana was represented throughout in a manner calculated to conserve and protect his right than to the actual characterization of such representative. The Court said further that the record showed throughout that the chancellor conducted the proceedings in a manner consistent with the assumption that Dana was of unsound mind. It appears to the writer, however, that if the adjudication of insanity in the original foreclosure proceedings had been properly attacked by the repsentative of Dana, the guardianship might have been set aside. It also occurs to the writer that since Dana was contending that his guardian had

---

[30]76 Miss. 372, 24 So. 168 (1898).
[31]Section 1241.
[32]192 Miss. 302, 5 So.2d 423 (1942).
[33]The Court probably meant MISS. CODE § 3219 (1906), since the original adjudication of insanity seems to have been made in February, 1917.

never been legally appointed such, and her act in executing the deed of trust was void, she had such an adverse interest to Dana as would have disqualified her as guardian ad litem.

Procedure Under the Present Law

Under the present law the procedure for adjudication of insanity is no longer referred to under the heading of "writs de lunatico inquirendo," this terminology having been dropped when the 1948 law was adopted. The present procedure was enacted by the legislature in 1950,[34] and was a revision of the law passed in 1948. It eliminated most of the defects which soon became apparent in that law. After providing that this act was exclusive in the matter of adjudging persons to be insane, lunatic, idiotic or feeble-minded, or to be suffering from any mental or nervous condition, affliction or disorder, or for commitment of such person to any mental institution of the state except in the matter of commitment or persons to the Veterans' Administration hospitals, as otherwise provided; Section 2 of the act provides that the chancellor or clerk may appoint guardians of the person and estate, or either, of anyone adjudged to be of unsound mind. This is done upon their own motion or the application of a relative or friend or any other interested party. This section makes specific provisions for the adjudication of the necessity for a guardianship where there is no necessity for confinement or special treatment. Under this section the hearing must be before the chancellor or the court, and the alleged incompetent must be given at least five days notice of such hearing. No mention is made of a jury trial. Such hearings may be had in vacation.

Sections 3-7 of the act then outline the procedure in case the person is in need of treatment, supervision or control, and these sections are the successors to the original statutes in Mississippi providing for commitment to the insane asylums by writs de lunatico inquirendo. Under these actions any relative or any citizen may make affidavit of the necessary facts and file it with the chancery clerk of the county of such person's residence or in which such person might then be found. Upon the filing of such an application, the clerk or the chancellor issues a writ directing the sheriff of the proper county to take the person into custody for an examination, and the clerk or chancellor forthwith appoints and summons two reputable licensed physicians to conduct an inquiry into the mental and nervous condition of such person. These physicians conduct such inquiry in the presence of the clerk and report their findings to the clerk. In all counties where there is a county health officer, he must be one of the physicians so appointed. Any other physicians are selected as having the best avail-

[34]Laws of 1950, c. 342.

able qualifications in the field of mental medicine and are not to be related to the person examined in any way, nor shall the physician have any direct or indirect interest in the estate of such person. The statute requires that the examination shall be held in the courtroom of the county or the office of the clerk unless the person to be examined is physically unable to appear. The right is given to any interested person to present evidence as to the mental or nervous condition of the person involved. The physicians making the examination are specifically exempt from any civil or criminal liability in any case in which they exercise due diligence and reasonable care, and act in good faith, without malice, and upon reasonable cause. The physicians make a finding first as to whether or not the person is suffering from a mental or nervous condition, disorder or affliction. Unless both physicians find such person is so suffering, then the clerk or the chancellor forthwith enters an order discharging such person. If the physicians find that the person is suffering from a mental or nervous condition, disorder or affliction, they may find that he is unable to look after his person and estate but is harmless and not in need of confinement or special treatment. In that event, the clerk, court or chancellor adjudicates such fact and may appoint a guardian for the person and estate, or either, of such mental incompetent, and release him in the care of his guardian. If both physicians find that the alleged mental incompetent is suffering from a mental affliction and needs treatment, supervision or control, or is likely to become dangerous and a menace if left at large, the clerk enters an order adjudicating such fact and issues a writ directing the sheriff of the proper county to take such person into custody, and deliver him to the director of the Mississippi State Hospital at Whitfield or East Mississippi State Hospital at Meridian.[35]

Provision is made for persons eligible for care in veterans' hospitals.

Upon delivery to any of said hospitals, the patient is again examined with all reasonable speed by the director and staff of the hospital and if he is found to be not suffering from a mental or nervous condition, affliction or disorder, the patient is discharged, such fact is reported to the clerk or chancellor, and an order entered accordingly.

The statute sets out no procedure in case the staff finds the person to be suffering from a mental or nervous condition, affliction or disorder, but not in need of treatment or likely to become dangerous. Presumably, if the two original examining physicians were right in their findings of mental disorder, but wrong in their adjudication of the necessity for confinement, the discharge of the patient from confinement would have to be

[35]It is the understanding of the writer that, according to the administrative procedure set up by the Mental Board, all original admissions are made at Whitfield.

handled administratively. The law provides that if the director and staff find that such person is suffering from a mental disorder, and in need of treatment or supervision or is likely to become dangerous if left at large, then such fact, together with the type of disorder, is reported to the clerk, which report is filed and entered on the general docket. The clerk also enters a final commitment order.

Section 8 of the act then sets forth a procedure by which a hearing can be had before the chancellor after such final order has been entered. To initiate this hearing, the person adjudged or any relative or person on his behalf may *at any time* after such adjudication file a petition in writing and request a hearing before the chancellor in term time or vacation. Upon the filing of the petition, the chancellor sets the date for the hearing and notifies the director of the proper hospital by registered mail and may require that such director and such person be present for said hearing. The section provides that the person adjudicated or anyone acting on his behalf shall have the right to summon witnesses and present evidence as in other cases. If aggrieved by the decision of the chancellor, the right to appeal to the state Supreme Court is given, "as in other cases in chancery court." The remedy given in this section is specifically stated to be in addition to the right to apply for a writ of habeas corpus.

Section 11 of the act brings forward the old law with reference to committing to mental institutions persons who have been acquitted of a crime on the ground of insanity or feeble mindedness. This section provides that where a grand jury or conservator of the peace reports a person charged with a crime to be insane or feeble-minded, such report shall be in lieu of the original affidavit, and the clerk shall proceed from that point.

Section 12 brings forth the old law with reference to commitment by two physicians. As in 1948, the requirement of a responsible citizen is dropped, as is the provision that the authorities act at their peril if the person be sane. As in the 1948 law, this section requires an examination by the director and staff of the hospital before the patient is admitted. It does not specifically mention government hospitals, but it does refer to Section 6 of the act, which includes such hospitals. Neither does this section provide for any final order of commitment. It does, however, give persons committed under this section the right of appeal as set forth in Section 8.

Section 14 provides the procedure for adjudication of recovery of persons adjudged to be of unsound mind. So far as has been called to the writer's attention, this is the first time the legislature has attempted to set out any procedure for a judicial adjudication that a person has been restored to mental competency. It provides that the petition for such

adjudication may be heard by the chancellor in term time or vacation, and that all interested persons shall have the right to appear and offer testimony. An adjudication of restoration to reason is competent proof thereof in any other court. If a guardian has been appointed, he is discharged. It would appear that the requirement of five days service of process before the hearing would apply.[36] However, the statute does not specifically require that anyone be given notice of such hearing. It simply states that all interested parties shall have the right to appear and offer testimony. It would seem to be the better practice to summon the guardian and the person or persons who filed the original affidavit asking for the adjudication of lunacy, if they are not joined in the petition.

Conclusion

In general, the procedure set out by the legislature with reference to mental incompetents by Chapter 342 of the Laws of 1950 is much superior to previous laws on the subject and reflects more closely the thought of modern medical authorities on the handling of persons suffering from mental and nervous disorders. It is the understanding of the writer that a former director of the Mississippi State Hospital at Whitfield had a large part in drafting the law of 1948, which is the real forerunner of our present law. The determination of the mental competency of a person is, after all, a matter which should be handled by experts in the field of mental treatment. Although in the majority of cases the ordinary laymen would probably recognize insanity and the danger of permitting such a person to go at large, some forms of insanity which can be very dangerous to the public are not easily recognized by laymen, lawyers or even the ordinary practicing physician. The provision for an examination by the director and staff of the hospitals, in effect, gives the patient a trial by a jury of experts.

There have not yet been any cases decided by our Supreme Court under this new statute. There are several questions which might arise under this act, one of which, at least, is serious. As previously stated, the act requires that in all counties wherein there is a county health officer, such county health officer shall be one of the physicians appointed for the examination. The question might arise whether the adjudication is legal in a case in which there was a county health officer, but he was unavailable for such examination, and two other physicians were procured. It was evidently the intention of the legislature in inserting this requirement that the county health officer be used, if possible, in order to cut down expenses of the inquisition rather than to give the alleged mental incompetent the absolute right to an examination by the county health officer, he not ordinarily being a mental expert.

---

[36]Miss. Code § 1231 (1942).

The question might also arise whether or not a guardian could be appointed for persons admitted on the examination of two physicians as set out in Section 12 of the act. Except for the provisions with reference to original notice to the patient and his relatives and the entry of a final order, the procedure under this section is really no different from the procedure set out in Sections 3-7. The right of appeal to the court is even preserved as in Section 8, even though, as pointed out previously, there is no provision for a final order to be entered by the clerk. Section 2 of the act provides that the chancellor or clerk may appoint guardians to persons adjudged to be of unsound mind *under the provisions of this act.* The question would then arise as to whether or not an admission under Section 12 would amount to an adjudication of the unsoundness of mind. Since under this section there is no final order of the court adjudging the person to be of unsound mind, and since, by the history of this act, this section evidently originated in the desire of the legislature to provide a simple method of admission to the hospital rather than a method for setting up a guardianship, it is doubtful that the court would have authority to appoint a guardian in such cases. This would be particularly true if our Supreme Court today followed the reasoning in the case of *Baum v. Greenwald,*[37] that the degree of proof required was greater and the procedure stricter in case a guardian was to be appointed.

The most serious question that arises under our present statute is the question of the constitutionality of a commitment without the finding of a jury. Section 31 of the Mississippi Constitution reads as follows:

> "The right of trial by jury shall remain inviolate, but the legislature may by enactment provide that in all civil suits tried in the circuit or chancery court nine or more jurors may agree on the verdict, and return it as the verdict of the jury."

It should be borne in mind that at the time of adoption of the Constitution of 1890 an adjudication of unsoundness of mind was made by a jury of six men, whether the writ de lunatico inquirendo was issued to bring about the apointment of a guardian or to bring about a commitment to an insane hospital.[38] Although the Supreme Court in *Fant v. Buchanan*[39] made the statement that the Constitution of 1890 vested the chancery court with full jurisdiction in the cases of idiocy, lunacy and persons of unsound mind, and that the legislature in regulating the exercise of this jurisdiction might dispense with a jury, too much reliance ought not to be placed on this statement because, as previously indicated, that part of the opinion was dicta. The real justification for the decision was the fact

---

[37]See note 29 *supra.*
[38]Miss. Code §§ 2118, 663 (1880).
[39]See note 6 *supra.*

that at the time the Constitution of 1890 was adopted, such matters were heard by a jury of six men as was done in the case under consideration.

It has been generally held in other states that where the right of trial by jury in such matters existed by virtue of a statute before the adoption of the constitution, such right is preserved by the adoption of constitutional provisions guaranteeing the right of trial by jury.[40]

There are, however, some good arguments to uphold the constitutionality of the present statute in addition to those reasons advanced in the case of *Fant v. Buchanan.* As stated by Justice Field in the case of *Koppikus v. State Capitol Commissioners,* [41] the right to a trial by jury is a right "which can only be granted in actions at law or criminal actions where an issue of fact is made by the pleading." Although in one sense it might be said that the question of sanity is a fact, for all practical purposes, it is a matter of expert opinion and not a question of determining the veracity of witnesses, as the jury is ordinarily called upon to do. It has also been argued that such a proceeding is not, in fact, a trial but is a proceeding conducted primarily for the benefit of the person involved. It was so held in the case of *State v. Linderholm.*[42]

The strongest argument for the constitutionality of the act would seem to rest in Section 8 of the act, which provides that the person involved may petition and secure a hearing before the chancellor or chancery court. In this connection, it should be borne in mind that Section 1275 of the Mississippi Code of 1942 provides for a jury in chancery courts in proper cases, and in the case of *State v. Marshall*[43] our Supreme Court upheld the right of the chancery court to invoke rather severe penalties under our prohibition laws. They said that the chancery court could call in a jury in a proper case. This case presents a strong argument for the upholding of the constitutionality of our present statute, at least in those cases in which no petition has been filed for a hearing before the chancellor and a jury requested. It seems to be generally held that even where the constitution guarantees the right of trial by jury, such right may be waived.[44] It should be noted, however, that in some of these cases, this right of waiver was considered in connection with the provisions for the representation of persons by counsel, and our statutes make no such specific provisions. In any event, until this question is decided by our Supreme Court or corrected by the legislature, it tends to throw doubt upon the validity of adjudications under our present statute.

---

[40] *In re* Moynihan, 62 S.W.2d. 410 (Mo. 1933); Peper v. Holtcamp, 235 Mo. 232, 138 S.W. 521 (1911); White v. White, 108 Tex. 570, 196 S.W. 508 (1917). See Note, 91 A.L.R. 93.

[41] 16 Cal. 249 (1860).

[42] 84 Kan. 603, 114 Pac. 857 (1911).

[43] 100 Miss. 626, 56 So. 792 (1911).

[44] See Note, 91 A.L.R. 97.

MANDAMUS

*Leslie Darden**

Mandamus is one of the ancient perogative writs, originally issued by the Court of King's Bench[1] and was brought into our practice in Mississippi at an early date.[2]

As the name of the writ implies, it is an order from a court of competent jurisdiction to a person, political body, officer or tribunal to do a certain act. Both under the common law and the present statute it is a method that is provided for enforcing the performance of legal duties imposed by a position of trust or office, where no other legal remedy is provided.[3]

Under the old practice in England, an application was made to the court, usually supported by affidavits, for a rule upon the defendant to show cause why a mandamus should not issue. When served on the respondent (defendant), the rule would be made absolute if no cause was shown against such action, and the alternative writ issued, which, in the same manner as a declaration, contained all the allegations of facts upon which the relator relied for the relief prayed.

The return of the respondent either showed performance, or set out the excuse or avoidance, or the respondent could take objection to the writ for matter of substance or form and have it quashed if defective. The allegations of the return were taken as true, and if the petitioner desired to controvert them, he was forced to bring the action for a false return.[4]

In the early Mississippi practice, the general procedures of the English practice were followed, except that a petition usually took the place of the original motion for a rule, and the fiat for the alternative writ took the place of the rule *nisi*. By provisions in the Code of 1871[5] the procedure was changed so that the writ issued upon an *ex parte* petition to the judge of the circuit court, the allegations of which were carried forward into the alternative writ was served upon the defendant. The defendant might then demur, move to quash, or answer the writ. From the time of the service of the writ, which also served as a declaration, the proceedings then proceeded as in other cases at law.[6]

---

*Smallwood & Darden, New Albany, Miss.

[1] Swan v. Buck, 40 Miss. 268 (1866).

[2] Madison County Court v. Alexander, 1 Miss. 523 (1832); John Robson, *ex parte*, 1 Miss. 412 (1831).

[3] See note 1 *supra;* Miss. Code § 1109 (1942).

[4] Haskins v. Scott County, 51 Miss. 406 (1875); Beaman v. Bd. of Police, 42 Miss. 237 (1868).

[5] Miss. Code §§ 533, 1517, 1519, 1520 (1871).

[6] Haskins v. Scott County, *supra* note 4.

The practice was further modified by the Act of April 5, 1876,[7] making the petition the leading pleading of the suit and taking the place of the alternative writ formerly issued, and the procedure has remained the same from that time until the present, except for such modification of the pleadings of the defendant as may be required under the 1948 act providing for a defense to be set up by answer, rather than by plea.[8]

Under our present practice, when a right enforceable by mandamus exists, the petition for mandamus is filed in the appropriate circuit court, setting forth the facts constituting the plaintiff's claim for the writ. The petition stands for the declaration, the clerk issues a summons for the defendant as in other actions at law, and the defendant pleads as in legal actions.[9]

Where the matter in question affects the public interest and the petition is by the attorney general or any district attorney, the case may be tried and determined in vacation, the rules applying to the trial of informations in the nature of quo warranto applying.[10] Other cases of mandamus are triable at the return term of the process.[11]

The statutory language providing for the writ is very broad, the circuit court being authorized to issue the writ on petition,

> ". . . commanding an inferior tribunal, corporation, board, officer, or person to do or not to do an act the performance or omission of which the law specially enjoins as a duty resulting from an office, trust or station where there is not a plain, adequate and speedy remedy in the ordinary course of law."[12]

Because of the broad scope of the writ as set out in the statute, much of the litigation arising on the question has resulted in a limitation or negation of the right of the court to issue the writ in particular circumstances, and by far the greater part of the cases in Mississippi deal with public officers and public bodies, rather than with private corporations or persons.

Our court has said that mandamus is an extraordinary writ, and ought to be issued only under extraordinary circumstances,[13] and even where an absolute legal right to the writ is shown, the question of whether

---

[7] Laws of 1876, c. 62.
[8] Laws of 1948, c. 230; MISS. CODE § 1475.5 (1942).
[9] MISS. CODE §§ 1110, 1111, 1112 (1942).
[10] *Id.* §§ 1112, 1118.
[11] *Id.* § 1112.
[12] *Id.* § 1109.
[13] Hancock County v. Highway Commission, 188 Miss. 158, 193 So. 803 (1940); McHenry v. State, 91 Miss. 562, 44 So. 831 (1907).

it will issue or not is still discretionary with the court.[14] The relief granted by the writ is strictly a legal one,[15] but the right to the relief is governed by equitable principles.[16]

Generally, the petitioner must show a clear right to the relief sought in his petition and by his proof,[17] and may not join two distinct causes of action in the one proceeding.[18] It must be shown that there are no further steps to be taken to determine the exact relief to which petitioner is entitled, as for instance, the determination of the exact amount due, or the reduction of a demand to judgment, since the court may not determine antecedent questions in the consideration of the question of whether the writ should issue.[19] Furthermore, an actual, not a prospective, default or refusal to act must have occurred, and the time within which the officer is allowed to act must have expired.[20]

In the ordinary cause where the writ is awarded, the action ordered to be performed is classed as a ministerial or administrative act, calling for the exercise of no discretion in the performance, as in the issuance of a warrant to pay a claim that has been allowed,[21] or to provide funds by taxation to pay valid county warrants.[22] So, too, in the purely administrative acts of assessing property that has escaped taxation in former years,[23] and the issuance of bonds after a validated election in favor of the issue,[24] mandamus has been held to be the proper remedy.

However, from the earliest Mississippi case[25] to those of most recent date,[26] our court has consistently held that where discretion is vested in the officer or body named as defendant in the petition, mandamus will not lie to control that discretion. The writ is available to compel action involving discretion, where other requirements are met, but may not compel action in any certain way.[27] Thus, it was held that a court might be com-

---

[14] Prentiss County v. Highway Commission, 207 Miss. 839, 42 So.2d 802 (1949); Wood v. State, 91 Miss. 562, 44 So. 831 (1907).

[15] Madison County v. Highway Commission, 191 Miss. 192, 198 So. 284 (1940); Hook v. Bank of Leland, 134 Miss. 184, 98 So. 594 (1924).

[16] Morris v. Robertson, 189 Miss. 592, 198 So. 290 (1940).

[17] Prentiss County v. Highway Commission, *supra* note 14.

[18] Haskins v. Scott County, *supra* note 4.

[19] Bd. of Education v. West Point, 50 Miss. 638 (1874); Clayton v. McWilliams, 49 Miss. 311 (1873).

[20] Wood v. State, *ex rel.*, 169 Miss. 790, 142 So. 747 (1932); State, *ex rel.*, Coahoma County, 64 Miss. 358, 1 So. 501 (1887).

[21] Hendricks v. Johnson, 45 Miss. 644 (1871).

[22] Taylor v. Chickasaw County, 70 Miss. 87, 12 So. 210 (1892).

[23] State v. Simmons, 70 Miss. 485, 12 So. 477 (1893).

[24] Calhoun County v. State, *ex rel.*, 206 Miss. 443, 40 So.2d 273 (1949).

[25] Madison County v. Alexander, *supra* note 2.

[26] Vicksburg v. Crichlow, 196 Miss. 259, 16 So.2d 749 (1944); Clarksdale v. Harris, 188 Miss. 806, 196 So. 647 (1940).

[27] Thomas v. Price, 171 Miss. 450, 158 So. 206 (1934).

pelled by mandamus to proceed to judgment, but the court granting the mandamus may not say what judgment shall be given.[28]

Under our statute, as at common law, the writ will not issue where a speedy and adequate relief by other legal action exists.[29] Generally, this rule has been applied where the writ was requested against a governing board or tribunal from whose decisions or orders the right to appeal is given, as a board of supervisors[30] or a municipal board.[31] And where there is a statutory provision for other relief by either appeal or original suit, mandamus is not the appropriate remedy.[32]

Although the relief is available against any officer under our statute, our court has held that it will not issue to compel the governor of the state to do any act.[33] Judicial bodies have been subject to the writ in accord with the rules set out above.[34] No Mississippi case involving mandamus has been found dealing with an attempt to compel any action by the legislature or a member or officer of that body, but it has been said that neither injunction, mandamus or other remedial writ will run against any member of the legislature in his official capacity.[35]

Turning to those cases where private persons or corporations are made defendants in mandamus proceedings, there appear to be two general classifications, one dealing with public utilities and the other with purely private concerns. In the first class it has been held that mandamus is an appropriate method to force the utility to render service under its franchise.[36] In the second group, mandamus has been used to enforce a stockholder's right to examine the books of the corporation in which he owns stock,[37] and to require issuance of stock by the officers of a corporation where a valid transfer has taken place.[38]

In the consideration of a set of facts where the use of mandamus is contemplated to obtain relief, the question frequently arises as to whether a petition for mandamus at law or a bill for injunction in equity is the

---

[28] Attala County v. Grant, 17 Miss. 77 (1847).

[29] Miss. Code § 1109 (1942).

[30] Quitman County v. State, *ex rel.*, 205 Miss. 43, 38 So.2d 314 (1949); Rankin County v. Lee, 147 Miss. 99, 113 So.194 (1927). *But cf.* Arthur v. Adam & Speed, 49 Miss. 404; Calhoun County v. State, *ex rel., supra* note 24. After valid order fixing certain rights, a subsequent order was entered attempting to set aside the original order, in which cases mandamus was awarded to enforce original order, rather than requiring appeal from rescinding order.

[31] Jackson v. McPherson, 158 Miss. 152, 130 So. 287 (1930).

[32] Pearl River County v. Lacey Lbr. Co. 128 Miss. 885, 91 So. 572 (1922).

[33] Vicksburg . . . R.R. v. Lowry, 61 Miss. 102 (1883); Wood v. State, *ex rel., supra* note 20 (but in which the governor was not a party).

[34] See notes 27 and 28 *supra.* It is also interesting to note that a court of equity may enjoin a party from proceeding in mandamus. Humphreys County v. Cashin, 136 Miss. 476, 101 So. 571 (1924).

[35] State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

[36] State, *ex rel.*, v. Benson, 108 Miss. 779, 67 So. 214 (1915).

[37] Sanders v. Neely, 197 Miss. 66, 19 So.2d 424 (1944).

[38] Jackson Opera House Co. v. Cox, 188 Miss. 237, 192 So. 293 (1939).

more appropriate action. The two remedies are not correlative,[39] and where available, mandamus must be used to the exclusion of the equity relief where the jurisdiction of the equity court is grounded on the inadequacy of the remedy at law.[40] It should be borne in mind, however, that the writ of mandamus will issue only an the conditions and by the persons authorized by the statute to have it issued.[41]

---

[39] Madison County v. Highway Commission, *supra* note 15.

[40] *Ibid.* For an interesting case involving mandatory injunction where only one factor was present which indicated the use of that remedy rather than mandamus, see Scherk v. Montgomery, 91 Miss. 426, 33 So. 507 (1903).

[41] Hancock County v. Highway Commission, 188 Miss. 158, 193 So. 808 (1940); Prentiss County v. Highway Commission, *supra* note 14.

WRIT OF PARTITION

*Martha W. Gerald**

The writ of partition was recognized at common law, but only coparceners could partite their joint estates by an action in the law courts, and the only method by which partition could be compelled was by *writ de partitione facienda.*[1] By statute this right was extended to joint tenants and tenants in common of estates of inheritance,[2] of life estates, and of other lesser estates.[3] Partition had its origin in the courts of law, but courts of chancery assumed concurrent jurisdiction, and in time this chancery jurisdiction became almost exclusive.[4] In this country partition has been held to be, even in the absence of a statute, a subject of settled equity jurisdiction.[5]

As early as 1807 we find that the statutes of the Mississippi Territory had made provision for a rather comprehensive procedure for partition of lands owned by coparceners, joint tenants, and tenants in common.[6] This act provided that application should be made to a Judge of the Supreme Court, or the Chancellor of the Territory, or the Presiding Justice of the County Court for the county in which the lands were located. Newspaper advertisement for two months of the proposed appointment of commissioners and partition was required, and it was required that the land be surveyed. The report of the commissioners was recorded as evidence of the partition. This act was brought forward in the Code in 1823,[7] but it is not until the Code of 1857[8] that we find a provision for the sale of lands for a partition of the proceeds. By 1871[9] the procedure used today in partition suits had become fixed by statute and there have been comparatively few changes since that time. The early requirement of a survey[10] in all partitions has been eliminated, and this matter is now left to the discretion of the commissioners. Also, the responsibility of deciding whether the land involved is susceptible of partition is no longer placed upon the commissioners but is now decided by the Chancery Court.[11]

---

*B.A., Millsaps College; L.L.B., University of Mississippi. Member firm of Wells, Thomas, Wells & Smith, Jackson, Miss.

[1] Henkel v. Henkel, 282 Mich. 473, 276 N. W. 522 (1937); THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, § 1910 (1924); THOMPSON, REAL PROPERTY, § 1979.

[2] 31 HEN. 8, c. 1 (1539).

[3] 32 HEN. 8, c. 32 (1540).

[4] Bledsoe v. Hood, 44 Ariz. 292, 36 P.2d 564 (1934).

[5] Donnor v. Quartermas, 90 Ala. 164, 8 So. 715 (1890); Adams v. McGraw, 99 Okla. 65, 225 Pac. 980 (1924).

[6] STAT. MISS. TER., c. 29, p. 252 (1807). Also, STAT. TER., p. 361 (1816).

[7] REV. CODE OF MISS., c. 38 (1823).

[8] MISS. CODE, art. 73, p. 551 (1857).

[9] HUTCHINSON'S CODE § 1823-1829 (1871).

[10] HUTCHINSON'S CODE, c. 42, art. 2 (1948).

[11] MISS. CODE § 965 (1942).

The procedure to be followed in partition of lands in this state and the right to avail oneself of the same are statutory and dependent in nowise upon the common law.[12] The procedure and the right are set forth fully by statute.[13] The suit is filed in the Chancery Court of the county in which the land is located, or, if the lands be held by devise or descent, in the county in which the will was probated or letters of administration issued.[41] All parties in interest must be joined,[15] and the procedure is the same as in other cases in chancery.[16] The court may order a sale for a partition of the proceeds if the land cannot be equally divided or if a partition in kind will not promote the interest of all parties.[17] The court may order the partition, making the division ifself,[18] or it may appoint three discreet freeholders not related to the parties to make a partition.[19] The commissioners must take an oath to faithfully perform their duties,[20] and, if they deem it advisable, they may have a survey made of the premises to be partited.[21] Otherwise, they shall make a plat of the land to be divided, assigning to each share a number. Then the commissioners draw these numbers from a hat at the same time the names of the persons entitled to the shares are drawn from another hat.[22] The commissioners may, if directed by the court or if they find it desirable, assign shares without balloting, and may direct that owelty be paid to equalize the shares.[23]

The commissioners must make their report at the next term of the court or as directed by the court. If there are no objections made or none sustained by the court and the report is confirmed, the decree is conclusive as to the rights of all parties to the suit.[24]

The suit can be maintained only by joint tenants, tenants in common, or coparceners having an estate in possession or a right of possession either in freehold or in a term of years not less than five.[25] It is not essential that the cotenants have estates that are equal, but all that is required is that they be cotenants of what is proposed to be

---

[12]Forest Product & Mfg. Co. v. Buckley, 107 Miss. 897, 66 So. 279 (1914).
[13]Miss. Code §§ 960-988 (1942).
[14]*Id.* § 961.
[15]*Id.* § 962; Millsaps v. Shotwell, 76 Miss. 923, So. 359 (1899).
[16]Miss. Code § 963 (1942).
[17]*Id.* § 965.
[18]*Id.* § 966.
[19]*Id.* § 967.
[20]*Id.* § 968.
[21]*Id.* § 969.
[22]*Id.* § 970.
[23]*Id.* § 971.
[24]*Id.* §§ 972, 977.
[25]*Id.* § 961.

partited.[26] Mineral owners have been held to be such tenants in common and their interests may be partited in kind.[27] The joint possession or right of possession is the basis of a partition suit,[28] the right and all proceeding being possessory, and, consequently, the rights of remaindermen cannot be partited or affected thereby;[29] neither can homestead property be partited after the owner's death if the surviving spouse is occupying or using it[30] or if the income therefrom is used to support such survivor.[31] The right to bring the suit is measured by the complainant's title and, if such title is not established, the bill must be dismissed, regardless of the weakness of the defendant's title.[32]

In early cases in this state our court held that partition would not lie where the title of the tenants in common was disputed.[33] By statute now, if the title be controverted, the court may determine the true title and apportion the encumbrances, if any, among the cotenants.[34] Also, the court may adjust all equities between the parties and settle the claims arising among the cotenants, so as to avoid a multiplicity of suits.[35]

A question which has caused considerable litigation is that with regard to when and under what circumstances a sale of the property for a partition of the proceeds, rather than a partition in kind, should be ordered by the court. By statute it is provided that upon a hearing the court may order a sale of all or a portion of the lands if it be satisfied that such a sale will "better promote the interests of all parties than a partition in kind" or if "an equal division cannot be made."[36]

---

[26]Lynch v. Lynch, 196 Miss. 276, 17 So.2d 195 (1944) (partition allowed where property devised to wife and minor son with provision that if son died during minority his share would go to the heirs of the testator); Black v. Washington, 65 Miss. 60, 3 So. 140 (1887) (partition allowed where plaintiffs owned one-half in fee, defendant owned one-fourth in fee and one-fourth per autre vie, and the other one-fourth fee was vested in unknown remaindermen).

[27]Hendrix v. Foote, 205 Miss. 1, 36 So.2d 145 (1948), *sup. of error sustained,* 38 So.2d 111 (1948), *motion sustained,* 205 Miss. 420, 38 So.2d 919 (1949); Wight v. Ingram-Day Lbr. Co., 195 Miss. 823, 17 So.2d 196 (1944).

[28]Barnes v. Rogers, 206 Miss. 887, 41 So.2d 58 (1949), partition in county court approved); Wirtz v. Gordon, 187 Miss. 866, 184 So. 798 (1938), *sug. of error overruled,* 192 So. 29, *cert. denied,* 309 U. S. 630.

[29]Lawson v. Bonner, 88 Miss. 235, 40 So. 488 (1906).

[30]Bohn v. Bohn, 193 Miss. 122, 5 So.2d 429 (1942), *appeal dismissed,* 316 U. S. 1283 (right of widow held to have the attributes and incidents of a life estate. Other heirs were vested with a future estate and no right of possession.)

[31]Wright v. Coleman, 137 Miss. 699, 102 So. 774 (1925); Tiser v. McKain, 113 Miss. 776, 74 So. 660 (1917).

[32]Mallory v. Walton, 119 Miss. 396, 81 So. 113 (1919).

[33]Shearer v. Winston, 33 Miss. 149 (1857).

[34]Miss. Code § 962 (1942); Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229 (1939).

[35]Walker v. Williams, 84, Miss. 392, 36 So. 450 (1904) Payment of common encumbrances and taxes gives a co-tenant a lien on the other shares for reimbursement Also, an occupying co-tenant is liable to the others for the value of the use and occupancy of the joint property).

[36]Miss. Code § 965 (1942).

This statute, as it appeared in the Code of 1871,[37] permitted a sale of the common property if it was impossible to make a fair and equal partition without impairing the value of the property. Our court has held that this statute is an innovation on the common law and, inasmuch as it takes away the right of the owner to keep his freehold in kind, it must be strictly pursued.[38] The law looks with favor upon a partition in kind, but with disfavor upon a sale unless one or the other of the two above mentioned statutory requirements are clearly shown by the facts in the case. The party seeking this sale has the burden of proof on the issue and he must show conclusively that an equal division cannot be made or that a sale would be more beneficial than an actual division.[39] If upon appeal the record fails to show the evidence upon which the Chancellor based his order for a sale, the case will be reversed by the Supreme Court.[40]

In the case of *Stern v. Great Southern Land Company*[41] the court, while recognizing the general rule with regard to the requirement of evidentiary proof, held that although the record in this case was silent as to whether or not the clay, oil and minerals involved could be partited in kind, the court would take judicial notice that such interests, by reason of their very nature, could not be partited in kind. However, this ruling was greatly modified in the later case of *Wight v. Ingram-Day Lumber Company*.[42] In this later case the court recognized that the exception of minerals to the general rule requiring evidentiary proof of non-susceptibility to partition was an artificial one. The exception was removed and the burden again placed upon the party urging a sale to show that the property proposed to be sold could not be partited in kind, whether such property be minerals or a surface estate.

The writ of partition is an ancient writ both in this state and at common law. It is not as much used today as it has been in former times, partly because of the fact that landholdings among families are not so extensive as they once were. It is still a useful writ on many occasions, however, and one by which a speedy and just division of property may be made.

---

[37]Hutchinson's Code § 1829 (1871).
[38]Cox v. Kyle, 75 Miss. 667, 23 So. 518 (1898).
[39]Wight v. Ingram- Day Lbr. Co., *supra* note 27; Hogue v. Armstrong, 159 Miss. 875, 132 So. 446 (1931); Shorter v. Lesser, 98 Miss. 706, 54 So. 155 (1911).
[40]Dantone v. Dantone, 205 Miss. 420, 38 So.2d 908 (1949); Coman v. Jordan, 187 Miss. 617, 174 So. 245 (1937); Hilbun v. Hilbun, 143 Miss. 235, 98 So. 493 (1924).
[41]148 Miss. 649, 114 So. 739 (1927).
[42]See note 27 *supra*.

WRIT OF PROHIBITION

*Knox White**

Prohibition is an extraordinary writ issued by a superior court to the judge and parties of a suit in an inferior court, commanding them to cease from prosecution of the action, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to the jurisdiction, but to the cognizance of some other court.[1]

The writ of prohibition is one of the oldest of the common law writs, dating from at least the twelfth century, and it seems to have originated in the conflict between church and state. It was used by the royal court against the ecclestiastical judges who flourished at the time.[2] Prohibition is akin to injunction and mandamus, but differs from the former in that it acts on the tribunal whereas an injunction is directed to the parties only, and differs from the latter in that it is prohibitory and the other mandatory.[3]

The first reported case to consider the question of prohibition in this state was *Clayton v. Heidelberg*.[4] Plaintiff in that case sought to prevent the board of police and sheriff from the levy and collection of a special tax for the erection of a courthouse. The Mississippi Supreme Court held that the board had power to levy the tax and hence jurisdiction over the matter was unquestionable; and if the power were actually being wrongfully exercised, prohibition was not the proper remedy. This decision cited no statutory authority for the issuance of the writ of prohibition, nor did the briefs of counsel mention any statute. The Court evidently proceeded on the theory that the writ was adopted in the state's jurisprudence along with the other common law writs. The Court, in its decision, reaffirms the historical function of the writ as one testing the question of jurisdiction only.

The Supreme Court of Mississippi has been following the decision of the *Clayton* case, without dissent, to this day. Prohibition will not be used to restrain the governor,[5] the mayor, alderman, town clerk or marshal,[6] or the board of supervisors and sheriff when not acting judicially[7] The writ does not lie to correct errors, or irregularities.[8] The writ may

---

*White & White, Gulfport, Miss.

[1]3 Bl. Comm.* 112.

[2]42 Am. Jur., Prohibition § 1.

[3]*Id.* § 3.

[4]17 Miss. 623 (1848).

[5]State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

[6]Fanning v. Town of Hickory, 201 Miss. 620, 30 So.2d 65 (1947).

[7]Holmes v. Bd. of Supervisors of Forrest County, 199 Miss. 363, 24 So.2d 867 (1946).

[8]Downing v. Davis, 34 F. Supp. 872 (S.D. Miss. 1940); Blount v. Kerley, 180 Miss. 863, 178 So. 591 (1938).

be issued by the circuit court only, as courts or original jurisdiction are the only courts with the authority to issue the writ, although the supreme court may consider questions raised on appeal from the circuit court, it has no authority to issue the original writ.[9]

A statute dealing with the writ of prohibition first appeared as Section 2850 of the Mississippi Code of 1892, in the same wording as Section 119 of the Mississippi Code of 1942.[10] This statute does not contain any matters relating to substantive law, but merely makes applicable the procedural law relating to the writ of mandamus.[11] It appears that the legislature accepted the fact that the common law writ of prohibition was applicable in Mississippi, and adopted rules dealing with the procedure to secure the writ only.

Prohibition is a remedial writ,[12] and it is an extraordinary writ to be used only in cases of extreme necessity when there is no plain, adequate and speedy remedy at law.[13]

Prohibition is not widely used to test jurisdictional questions at the present time. Since 1930, however, it has seen wide use in eminent domain actions. In that year the legislature enacted what is now Section 2782 of the Mississippi Code of 1942.[14] Prior to that time, the only method to determine legal questions (as distinguished from questions of value) in eminent domain proceedings had been by injunction, and naturally the cost of the bond required to halt building programs was prohibitive, if any such bond was available at all.

Again the legislature dealt with procedural aspects mainly. After designating the two legal questions the writ was designed to test, the statute then provides the procedure to be followed in obtaining the writ, and also provides that the procedure should be governed, where applicable, by the statutes relating to quo warranto.[15]

In the recent case of *Erwin v. Mississippi State Highway Commission*,[16] the Mississippi Court held that there is no way to test judicially

[9]Wynne v. I. C. RR, 105 Miss. 784, 66 So. 411 (1914); Planters' Ins. Co. v. Cramer, 47 Miss. 200 (1872); Downing v. Davis, *supra* note 8.

[10]"All the foregoing provisions regulating the proceedings on the writ of mandamus will apply, as far as the nature of the remedy will allow, to proceedings on writs of prohibition."

[11]Miss. Code §§ 1110-1118 (1942).

[12]Reynolds v. New Albany, 166 Miss. 282, 146 So. 459 (1933).

[13]Crittenden v. Booneville, 92 Miss. 277, 45 So. 723 (1908).

[14]"The legal remedy by way of prohibition is made applicable for the purposes of testing the questions (1) whether the applicant seeking to exercise the right of eminent domain is, in character, such a corporation, association, district or other legal entity as is entitled to the right, and/or (2) whether there is a public necessity for the taking of the particular property or a part thereof which it is proposed to condemn." The section goes on to set up the procedure to be followed.

[15]Miss. Code §§ 1120-1145 (1942).

[16]213 Miss. 885, 58 So.2d 52 (1952).

the issue of public necessity except by petition for a writ of prohibition under Code Section 2782, and that was the exclusive remedy in the absence of fraud or abuse of discretion.

In prior cases,[17] the Court had intimated that the writ of prohibition was supplemental and ancilliary to the preexisting remedy by way of injunction. However, the decision in the *Erwin* case effectively dispelled all doubt on that point, although it would appear that the remedy by way of injunction is still open to test the right of the condemnor to exercise the power of eminent domain. The statute specifically provides that an appeal from an order denying the petition shall not operate as a supersedeas, so the importance of the decision in the *Erwin* case is immediately manifest. In a case challenging the public necessity for the taking of the property sought to be condemned, without any allegation of fraud or abuse of discretion, an order denying the writ is ordinarily the final decision, for then the work will continue, and the case will usually be moot on appeal. In a case testing the power of the condemnor or questions of fraud or abuse of discretion, then it would appear that the remedies of prohibition and injuntion are co-existent, but the requirements of a bond might nevertheless make the latter remedy prohibitive in many cases.

In conclusion, although prohibition is an extraordinary writ and little used for that reason, it does fill an important place in the law in the situations wherein it is applicable and, most of all, enables a litigant whose resources are limited to seek relief in the courts when the remedy by injunction is denied him because of the requirements of filing a bond become too onerous financially.

---

[17]Highway Commission v. Cockrell, 205 Miss. 826, 39 So.2d 494 (1949); Dantzler v. Highway Commission, 187 Miss. 721, 193 So. 4 (1940).

QUO WARRANTO

*Hugh Clayton**

What Is It?

The first time that quo warranto was used is unknown. The writ of quo warranto is a remedial process and one not commonly used in Mississippi. However, it has a distinct use and purpose, and it is hoped that this brief summary will be of practical benefit to the attorneys in Mississippi whenever an occasion does arise which will require its use.

Its history and origin is very aptly stated by one of the leading legal encyclopedias:[1]

> "§ 3. Origin and History.—Quo warranto is a common-law remedy. Its origin is obscured by antiquity and little is known thereof save that the writ came into existence at some unascertained period early in the history of that system. The ancient writ of quo warranto was a high prerogative writ of right for the King against one who usurped, misused, or failed to exercise some office or franchise. To correct the abuse of the royal prerogative in respect to such writ and to give opportunity for a fair and convenient hearing, statutes were passed in the reign of Edward I. The ancient writ of quo warranto became obsolete in England, due to the finality of the judgment and the complicated and cumbersome nature of the proceeding. It was supplanted in time by the remedy by information in the nature of quo warranto, which was criminal in nature and was instituted not only to fine the usurper, but to oust him from the office, franchise, or liberty. There is no historical certainty as to the origin of this latter remedy. It was in use, it is said, contemporaneously with the writ of quo warranto before the Statute of 9 Anne, chap. 20, which expressly recognizes its existence. The early English statutes respecting quo warranto, including the Statute of 5 Wm. & Mary, chap. 18, and the Statute of Anne, have been said not generally to have been in force in this country as part of our common law, although in some instances they seem to have been recognized as such. By constitutional and statutory enactments, they have been made part of the judicature of the various states. Where there are no statutory provisions on the subject, the courts are left to the common-law principles and the interpretation of the applicable English statutes.
>
> "§ 4. Constitutional and Statutory Provisions.—Reference has been made in the preceding section to the early English statutes relating to quo warranto. By an act of Parliament of more recent date, the proceeding took on a civil character. In very many, although not all, jurisdictions in this country, there are constitu-

*Attorney at law, New Albany, Miss.

[1] 44 Am. Jur., Quo Warrento §§ 3-4.

> tional or statutory provisions dealing with quo warranto. Many of these enactments are similar to the Statute of Anne, or embody its substance, while others, although modeled after that statute, differ therefrom in material particulars. In some instances they considerably extend the functions of the ancient writ of quo warranto.
>
> "Statutes relating to quo warranto, being remedial, will be interpreted and applied in accordance with the rules governing remedial acts generally, that is to say, they will be construed and administered so as to advance the remedy and render it effective."

The proceeding in Mississippi is largely statutory by virtue of legislative enactments contained in Chapter 2 of Title 9 of the Mississippi Code of 1942.[2]

The effect of such statutes on the common law remedy was enunciated by our Court in the case of *Newsom v. Cocke*,[3] in which it is said:

> "The ancient and appropriate proceeding to try and determine the right and title to all offices and franchises, was under the writ of quo warranto; and where a legal question was involved, this was the only mode of determining it; the applicant first established his title to the office, and then possession of the books and papers was enforced as a matter of course. By our statute regulating informations in the nature of a quo warranto, this old remedy is not only preserved, but rendered more expeditious and convenient; and is declared the appropriate proceeding to try the right to any office in this state, civil or military, or in any county or town thereof. Provision is made for the determination of issues of law and fact; and that the right of trial by jury so vital to the decision of the latter, is expressly maintained and declared. This, then, is emphatically the constitutional and proper mode of proceeding for the trial of title of offices."

For What Is It Used?

The purpose of quo warranto is basically two things, to determine the proper exercise of public office and to determine the proper exercise of corporate franchises and powers. Fortunately, as mentioned before, in Mississippi the purposes for which this remedy exists and the method by which it is obtained are largely spelled out by statute.[4]

---

[2]Miss. Code §§ 1120-1145 (1942).

[3]44 Miss. 352 (1870).

[4]Miss. Code § 1120 (1942) lists ten situations where quo warranto is applicable. Summarized, they are as follows: (1) whenever any person wrongfully exercises the functions of a public or corporate office; (2) whenever any public officer has forfeited his office; (3) whenever persons act as a corporation without being legally incorporated; (4) whenever a corporation misuses its powers or ceases to discharge the duty for which it was created; (5) whenever any corporation wilfully exercises powers not conferred by law; (6) whenever any corporation fails to exercise powers

It may be of interest to mention certain types of cases which illustrate how this proceeding applies to the holding of public office. The right to hold the municipal office of City Assessor and Tax Collector of Vicksburg was determined in the case of *Kelly v. State*.[5] It was held in this case that such was a public office within the meaning of the statute on quo warranto. Another municipal office involved in a quo warranto proceeding was that of City Councilman of Biloxi in the case of *State v. Tucei*.[6] The right of an individual to hold the office of Town Marshall of Lambert was also held to a quo warranto proceeding in the case of *Omar v. West*.[7]

With regard to the office of sheriff, it was held in the case of *McKenzie v. Thompson*[8] that the remedy to question the right to the office was quo warranto. School trustees are public officers and the right of an individual to hold such an office may be question in a quo warranto proceeding.[9]

This special remedial writ has even been extended to determine the question as to who was entitled to serve as Secretary and Clerk of the Board of Trustees of the State Penitentiary. It was adjudicated in the case of *Yerger v. State*[10] that, since the office was created by statute, it was a public office and, therefore, the remedy of quo warranto was the appropriate type of proceeding to determine which individual was to serve as secretary and clerk, the definition given to a public officer being:

> "A public officer is one who has some duty to perform concerning the public, and he is not the less a public officer when his duty is confined to narrow limits, because it is the duty and the nature of that duty which makes him a public officer, and not the extent of his authority."

The above illustrations are examples of public offices which have been held subject to a quo warranto proceeding. The writ has been used

---

essential to its corporate existence; (7) whenever any corporation by law forfeits its franchise; (8) whenever any corporation wilfully persists in the violation of corporate regulation or the criminal law; (9) whenever any corporation not created by the laws of this state forfeits the right to do business here because of persistent refusal to obey the laws of this state; (10) whenever any non-resident alien or corporation acquires or holds lands contrary to law.

The remedy of quo warranto is fully covered as a separate topic in the several digest systems.

[5]79 Miss. 168, 30 So. 49, (1901).

[6]175 Miss. 218, 166 So. 370 (1936).

[7]186 Miss. 136, 188 So. 917 (1939).

[8]186 Miss. 524, 191 So. 487 (1939).

[9]State v. Bounds, 54 So.2d 276 (Miss. 1951); Hood v. Cruso, 179 Miss. 234, 174 So. 552 (1937); Ellis v. Graves, 82 Miss. 36, 34 So. 81 (1903).

[10]91 Miss. 802, 45 So. 849 (1908).

in these cases to determine what person is entitled to hold the office, enjoy the emoluments therefrom and discharge the official duties thereof.

There are not as many cases in Mississippi where the remedy of quo warranto has been used against corporations. However, two are worthy of note. One is the case of *State v. Senatobia Blank Book & Stationery Company*,[11] where the attorney general sought on behalf of the state a judgment of forfeiture and ouster against the corporation on the ground that fraud had been practiced in obtaining its charter and all the acts of the alleged corporation had been in violation of law. The respondent demurred and it was held by Mississippi Supreme Court that quo warranto "was eminently the correct procedure."

One of the most interesting cases where a quo warranto proceeding was filed in an effort to secure a judgment for forfeiture and ouster of a corporation's franchise and right to do business is that of *Kennington-Saenger Theatres, Inc., v. State*.[12] The suit was brought by the state on the relation of the District Attorney of the Seventh Judicial District on the ground that the respondent corporation persistently refused to comply with the laws of the state. The judgment of the circuit court was that the state should prevail, but on appeal, by a divided opinion, the Supreme Court held that since the respondent corporation, under its charter, could do business throughout the state and the effect of the judgment of the circuit court would therefore be statewide, only the attorney general could bring a quo warranto proceeding against a corporation which was authorized to do business over the entire state. Consequently, the decision turned on the proposition that the circuit court had no jurisdiction since the suit should have been brought only by the attorney general. The suit was dismissed without prejudice for such further action as the state through the attorney general might desire to initiate. However, this case is cited to illustrate how the remedy of quo warranto may be brought by either the attorney general or the district attorney, in proper instances, against corporate defendants.

How Is It Used?

The Code chapter on quo warranto details, step by step, the procedure for its use. However, to make this summary complete, it is appropriate to make some general comments as to procedure.

The proceeding is initiated by the filing of an information in the nature of a quo warranto. In matters in which the state, as such, is interested, the information must be filed by the attorney general, either on

[11]115 Miss. 254, 76 So. 258 (1917).
[12]196 Miss. 841, 18 So.2d 483 (1944).

his own motion or on the relation of another. In matters affecting counties and county district officers, it is the duty of the district attorney to file the information in the name of the state or on the relation of another. Section 1121 of the Mississippi Code is clear and unambiguous as to how and where such proceedings are filed.

This section has been enlarged by the decision of the Supreme Court in the case of *Kennington-Saenger Theatres, Inc., v. State,*[13] where it was specifically held that the district attorney could not file an information in the name of the state in matters of state wide interest or concern.

The claimant to a public office may initiate the proceeding in his own name, and the proceeding is private instead of public, as where the proceeding is begun by the attorney general or the district attorney. The forms of the information are contained in Code Sections 1123 and 1124. The proceeding is civil and not criminal. During the pendency of the proceeding the Court, or the circuit judge in vacation, may make all proper orders, and the cause is tried as other civil proceedings in the circuit court with a jury to determine issues of fact. The cause may be tried in vacation, but whether or not the circuit judge will try the same in vacation is left to his sound discretion.

Should the quo warranto proceeding be successful against a corporation, it is the duty of the court to appoint one or more trustees to handle the assets of the corporation, collect the same and discharge the obligations of the corporation. Such trustees make bond, have a right to take custody of all the property of the corporation, and then render an inventory to the chancery court or chancellor in vacation, as the case may be. The liquidation of the corporation is handled under the jurisdiction of the chancery court or the chancellor in vacation; claims of creditors are presented and audited and notice is given to creditors as in the administration of estates. The chancery court allows the trustees compensation and, should the corporation be insolvent, a priority is established by statute as to the payment of costs, fees, expenses and debts.

With regard to the burden of proof in the trial itself, where the proceeding is brought by the state, the rule is:

> "In a quo warranto proceeding to try title to a public office, where the state is relator, instead of another individual claimant of the office, the burden is on the respondent to prove his right or title to the office."[14]

---

[13]196 Miss. 841, 18 So.2d 483 (1944).
[14]Jones v. State, 207 Miss. 208, 42 So.2d 123 (1949).

However, the rule is the opposite where a private individual brings the proceeding:

> "When a private litigant brings quo warranto, acting independently and not on the relation of the state, the burden of proof is upon him to show his right to the office by a preponderance of the evidence; and the nature of the evidence must be clear and dependable, since in such case the presumption of right rests with the occupant of the office."[15]

The judgment rendered where the issue to be resolved involves a public office shall be "according to the rights of the respective claimant."[16] If the judgment is in favor of the relator, he shall be entitled to the office on qualifying according to law and may recover of the defendant, in an action for that purpose, all damages that may have accrued in consequence of withholding the office from him. Of course, if the judgment be not in favor of the relator, then the costs may be assessed against him, if a private individual, and the defendant will continue to remain in office.

The matters of process for witnesses, fees of the circuit clerk, sheriff, jurors and witnesses, proceed as in other circuit court matters.

Some General Comments

Two or three observations are in order which may be of benefit to the practicing lawyer. Before one may file an information in the nature of a quo warranto relative to the exercise of a public office, it is necessary that the defendant be in possession of the office and usurping its functions. In the case of *O'Neal v. Fairley*[17] this rule is stated as follows:

> "In order to maintain such a proceeding as this to try the right to a public office, it must appear that the respondent is in actual possession and use of the office in question. It is not sufficient for the information to show that the respondent lays some claim to the office without usurping the functions thereof."

One may not go into chancery court and seek by injunction to prevent a party from exercising public office. This rule has been recently enunciated in the case of *Yates v. Summers*,[18] where such a proceeding was filed in chancery court. On this point, the Mississippi Supreme Court said:

---

[15]Hood v. Cruso, *supra* note 9.
[16]Miss. Code § 1122 (1942).
[17]190 Miss. 650, 200 So. 722 (1941).
[18]177 Miss. 252, 170 So. 827 (1936).

"Early in the jurisprudence of this state, a chancellor declared that the legality of an election for trustees could not be investigated in a chancery court by means of an injunction; that this could only be done by information in the nature of a quo warranto, regularly prosecuted before the proper tribunal. Moore v. Caldwell, Freeman Ch. 222. In Town of Sumner v. Henderson, 116 Miss. 64, 76 So. 829, this court said: 'This suit is an attempt by injunction to try the right and title to the offices of these defendants who are exercising the duties of these offices. The proper remedy is by quo warranto, not by injunction. . . . The rule is thus stated in Pomeroy's Eq. Jur. vol. 5, § 333: "It is a principle of universal application that an injunction will not issue when its object is to try title to public office." . . . The appointment of these defendants by the Governor, whether legal or illegal, and the performance by them of the duties constitute them de facto officers at least. Adams v. Bank, 75 Miss. 701, 23 So. 395'."

It has been held that a special judge could not be appointed to try a quo warranto proceeding where the regular circuit judge recused himself, the proper procedure being that a regular judge of another district should act.[19]

An interesting distinction with regard to contests as to public office is contained in the case of *McKenzie v. Thompson*.[20] McKenzie contested the nomination of Thompson as a Democratic nominee for sheriff. The County Executive Committee held for Thompson, and McKenzie instituted proceedings under the Corrupt Practices Act[21] to contest the nomination before the special court provided for in that Act. Thompson was again declared the nominee and McKenzie appealed to the Mississippi Supreme Court, contesting Thompson's nomination on the ground that he was not a qualified elector of the county. It was Thompson's position that his qualifications for office were not involved in this special proceeding. The Supreme Court agreed with him saying:

"The special tribunal set up by the Corrupt Practices Act has no authority to go beyond ascertaining the will of the qualified electors participating in the party primary. To that end it has the authority and duty to determine whether those voting or offering to vote are qualified electors and entitled to vote, and whether in all substantial respects the election was fairly and honestly held in compliance with the various provisions of the law. Hayes v. Abney, Miss., 188 So. 533.

"We think by analogy this question is governed by the principles applicable to contests between candidates in a general elec-

[19]Kelly v. State, *supra* note 5.
[20]See note 8 *supra*.
[21]Laws of 1935, c. 19.

> tion. It is a public question, not a private one. The only remedy is after the general election in the nature of a quo warranto under Section 3053, Code of 1930, which provides for such a remedy in the name of the state against any person who unlawfully holds or exercises the functions of a public office. May v. Young, 164 Miss. 35, 143 So. 703; Omar v. West, Miss., 188 So. 917.
>
> "McKenzie does not claim that he was nominated by receiving a majority of the votes, but that Thompson was not because he was not eligible to the office. In other words, he admits that Thompson got the majority of the legal votes cast, but they should not be counted for him because of his disqualification to hold the office. That is a public question, and not a private one."

This brief treatment of the subject of quo warranto can only serve as an outline as to how the proceeding is initiated, for what purpose it exists and over what types of subject matter it applies. It has been the purpose of the writer to cover these points generally but, at the same time, to list information which will be of benefit to any lawyer who would have occasion to use this extraordinary remedy. It is hoped that this brief statement will constitute a possible working tool for such an attorney. It is well to remember that the proceeding is basically a judicial question, addressed to (1) one holding public office, inquiring by what warrant he holds public office, or (2) to a corporation, inquiring by what warrant it acts and if its actions are in accordance with law.

REPLEVIN

Phineas Stevens and *Francis B. Stevens**

A general discussion of the law of replevin in Mississippi would necessitate the review of all decisions involving the application of the writ to the various situations in which it is used, together with a recital of the procedural steps which are particularized with unusual detail in the statutes.[1] Such a treatment would be beyond the scope of a law journal article, and this article, therefore, will be confined to a short review of the history of the writ in Mississippi, together with a discussion of a few of the problems that arise in the trial of replevin cases.

The writ is one of the oldest remedies known to the common law,[2] but, in spite of this, it apparently never existed in Mississippi prior to the enactment of our statute. The case of *Wheelock v. Cozzens*[3] was decided by the High Court of Errors and Appeals at the January term of 1842, a month before our first general replevin statute was passed by the legislature. The plaintiff filed an affidavit, setting forth the wrongful detention of a Negro slave, and prayed for the issuance of the common law writ of replevin. The plaintiff posted bond, the writ was issued and executed, and a declaration was filed. The defendant thereupon moved to quash the writ on the ground that the action would not lie at common law,[4] and, on appeal, this contention was sustained, largely because of the inability to require bond from the plaintiff in the absence of statute.[5] Chief Justice Sharkey, however, was of the opinion that the writ had been adopted as a part of the common law, but that it would not lie in this case because the plaintiff alleged only a wrongful detention and not a tortious taking.[6]

---

*Members firm of Stevens & Cannada, Jackson, Miss..

[1]Miss. Code, c. 6, tit. 12 (1942).

[2]Wells, Replevin § 1 (1880).

[3]7 Miss. 279 (1842).

[4]The defendant's counsel argued that the remedy did not exist at common law, except in the case of distress for rent, and cited Blackstone's Commentaries in support of the contention. The argument appears unsound, for although the writ originated as a means of contending with the landlord's practice of distraining cattle or rent, it was later extended to other cases where personal property was wrongfully taken and detained and later writers have proved Blackstone to have been in error in this regard. See Cobbey, Replevin § 1 (2d ed. 1900).

[5]After the writ of replevin was introduced in England, Parliament found it nessessary to enact statutes to control its use. The most important of these were the Statute of Westminster 2, 1285, 13 Edw. I, c. 1, and the Distress for Rent Act, 1737, 11 Geo. 2, c. 19, which required the plaintiff to give bond for the prosecution of the suit and return of the goods in case such be ordered after trial. See Wells, Replevin §§ 27-29 (1880). These statutes, of course, had not been enacted in Mississippi, but it appears that they were ancient enough to be properly considered a part of the common law.

[6]The concurring opinion seems to have been correct in this point, for although all jurisdictions in this country at an early date extended the remedy to cases of wrongful detention, at early common law the writ would lie only where there had been a wrongful taking and wrongful detention. See Shipman, Common-Law Pleading 233, 235 (3d ed. 1923).

The first statute providing for a writ of replevin was the 1822 act entitled "An Act for the Better Securing the Payment of Rents, and Preventing the Fraudulent Practices of Tenants, and to Regulate the Practice of Suing Out and Prosecuting Writs of Replevin."[7] This statute was, of course, the forerunner of our present statute providing for attachment for rent and a writ of replevin by the tenant or a third person to recover the goods attached.[8] The original statute has been enlarged to such an extent that the procedure is now set forth in as much detail as our general replevin statute.[9] All of the earliest Mississippi cases, with the exception of *Wheelock v. Cozzens*, were based on this distress for rent statute.

On March 2, 1833, the legislature passed an act[10] entitled "An Act to Organize and Establish Circuit Courts, and to Define Their Powers and Jurisdiction in Law and Equity," the last section of which provided that the action of replevin should not be confined to the recovery of personal property distrained or attached for rent, but should be for the recovery of any personal property unlawfully taken *or* detained in any case. The statute provided that the plaintiff should make the usual affidavit and enter into bond conditioned as provided in cases of attachment for rent, in double the value of the property as set forth in the affidavit. No other procedure was specified, and it was apparently intended that common law procedure should apply. Three years later the section providing for replevin was repealed.[11]

Our present statute, providing for replevin in all cases of wrongful detention of personal property, was first enacted on February 14, 1842.[12] The only significant changes which have been made since that date have been the addition of detailed procedural provisions; the application of the writ has not been changed.

Under this statutory procedure, the action is initiated by the filing of an affidavit, which must set forth:[13] (a) a description of the personal property; (b) the value thereof, with the value of each separate article set

---

[7]HUTCHINSON'S CODE, c. 56, art. 5 (1848).
[8]MISS. CODE §§ 910-945 (1942).
[9]The procedure set forth in this statute follows in general the old common law pleading with a declaration (Section 931), a plea (Section 932), an avowry (Section 933), and a replication (Section 934). *Cf.* SHIPMAN, *op. cit. supra* note 6 §§ 111, 112, 178-181.
[10]REVISED STATUTES (1824-38), p. 409.
[11]*Id.* at 577.
[12]HUTCHINSON'S CODE, c. 56, art. 11, p. 817 (1848).
[13]MISS. CODE § 2841 (1942).

forth; (c) that the plaintiff[14] is entitled to the immediate possession thereof; (d) that the property is in the possession of the defendant; and (e) that the defendant wrongfully took and detains, or wrongfully detains[15] the same. The statute sets forth to whom the affidavit is presented for the issuance of the writ, and then provides that the writ shall be ". . . returnable, as a summons, before the proper circuit court when the value exceeds two hundred dollars, or to the court of the proper justice of the peace if the value shall not exceed that sum. . . ." For jurisdictional purposes, the value of the property alleged in the affidavit is controlling in the absence of a showing that the plaintiff intentionally overvalued or undervalued the property for the purpose of obtaining or defeating jurisdiction in a particular court.[16] As at common law, however, the plaintiff may also sue for damages for the wrongful taking and/or detention of the property.[17] What, then, if the plaintiff alleges in his affidavit that the value of the property is $190 and, in his declaration, alleges damages for wrongful detention in the amount of $100? Based upon the value alleged in the declaration, the writ would be returnable to a justice of the peace, but, after the declaration is filed, does the justice still have jurisdiction to proceed with the cause? There is no provision in the statute for removing the case to a higher court, and if the writ is made returnable to the circuit court, it would be summarily quashed, either on the defendant's or the court's own motion. The end question presented is whether the replevin statute violates Section 171 of the Mississippi Constitution,[18] or, in other words, is "the principal amount in controversy" the value of the property only or the value plus damages for wrongful detention?

In support of the contention that the principal amount in controversy is the combined value of the property and damages, several cases might be considered analogous. In *Adams Newell Lumber Co. v. Jones*,[19] the

---

[14]One of the most frequent defects in replevin affidavits results from the careless use of printed forms which, following the wording of MISS. CODE § 2842 (1942), provide that "the property of affiant" is wrongfully detained. If the affiant is the agent or attorney of the plaintiff (MISS. CODE § 2841 (1942)), the language of the affidavit must be changed accordingly. See, *e.g.*, Tatum v. Sciscoe, 189 Miss. 803, 199 So. 70 (1940); Choctaw Culvert Co. v. McCool, 172 Miss. 1, 158 So. 796 (1935); Herrington v. Stimpson Co., 159 Miss. 416, 131 So. 878 (1931).

[15]Originally, at common law, the action would lie only when there was a wrongful taking. Wheelock v. Cozzens, *supra* note 3.

[16]Johnson v. Tabor, 101 Miss. 78, 57 So. 365 (1912); Ball Brown & Co. v. Sledge, 82 Miss. 749, 35 So. 447 (1903).

[17]Section 2860 authorizes such damages expressly by providing that if the plaintiff shall recover, the judgment shall be for possession of the property or its value and that the defendant "pay to the plaintiff such damages as shall have been assessed by the jury for the wrongful taking and detention, or for the wrongful detention thereof."

[18]The applicable part of Section 171 is as follows: "The jurisdiction of justices of the peace shall extend to causes in which the principal amount in controversy shall not exceed the sum of two hundred dollars. . . ."

[19]162 Miss. 517, 139 So. 315 (1932).

plaintiff sued in circuit court for the negligent killing of a cow valued at $150 and for punitive damages of $2,750. The plaintiff being obviously optimistic in his claim for punitive damages, the defendant moved to dismiss for lack of jurisdiction and, on appeal, assigned as error the court's refusal to sustain the motion. The Mississippi Court held that there was no merit in the assignment ". . . for the reason that the declaration not only sought to recover the value of the cow, but also punitive damages in the sum of $2,750."[20] In like manner, it can be argued that the plaintiff in replevin is seeking to recover not only the possession of the personal property, or its value, but also damages for the wrongful taking and/or detention; that such damages are actually more realistic than punitive damages; and that the "principal amount in controversy" is, therefore, the value of the goods plus damages for wrongful taking and/or detention.

The case of *Mobile & Ohio Railway Co. v. Greenwald & Champenois*[21] is similar. There the plaintiff sued for and recovered judgment in circuit court in the amount of $190 actual damages to a mule, together with $25 statutory damages for failure of the railroad company to settle the claim for damages to freight within the time prescribed by statute. On appeal, the defendant contended that the circuit court had no jurisdiction because the $25 statutory penalty was incidental, like interest and court costs. The Supreme Court held, however, that the suit was properly brought in the circuit court, "the amount of demand being in excess of $200.00."[22]

The converse of the argument is that replevin, being a possessory action, involves primarily the property in question, and that damages for the wrongful taking and/or detention of the property are strictly incidental to the main purpose of the proceeding. In the case of *Brumfield v. Hoover*,[23] the court held that the value of the property determines the court's jurisdiction in replevin, not the amount of the debt for which the seizure is made, and that when the property exceeds $200 in value, the circuit court has jurisdiction, even though the defendant only owed $66.66 on the property. If the reasoning of this case is followed, damages for wrongful taking and/or detention certainly should be disregarded in determining jurisdictional amount.

This question was squarely presented in a Florida case,[24] but under a constitutional provision slightly different from our own.[25] There the

---

[20] *Id.*, 139 So. 315 316.

[21] 104 Miss. 417, 61 So. 426 (1913).

[22] In Vance v. Vandercook Co., 170 U. S. 468 (1897), which arose under a South Carolina replevin statute, it is indicated that damages for wrongful detention may be added to the value of the property to determine the amount in controversy for purposes of federal jurisdiction.

[23] 90 Miss. 502, 43 So. 951 (1907).

[24] Goldstein v. Miami Wrecking Co., 137 So. 283 (Fla. 1931).

plaintiff sued to recover possession of goods valued at $478.44, and was allowed damages for wrongful detention in the amount of $57.00. The suit was brought in circuit court, whereas the Florida Constitution provided that the county courts ". . . shall have jurisdiction of all cases at law wherein the demand or value of the property involved shall not exceed $500.00."[26] On appeal, the supreme court reversed the judgment, on the ground that the circuit court did not have jurisdiction, and held that such a judgment, if rendered in a county court, would not be in violation of the constitution. The court reasoned that to hold otherwise would mean that the replevin statute was unconstitutional. Under our own statute[27] it is clear that the writ is returnable to a "circuit court when the value exceeds two hundred dollars, or to the court of the proper justice of the peace if the value shall not exceed that sum," and it is also clear that damages for wrongful detention are allowed. There is no provision in the statute for removing the cause to a higher court after the declaration is filed, and if the plaintiff is not allowed to continue and secure a valid judgment for the value plus damages, then the statute would be in conflict with the constitution.

The statute on venue provides that the action may be instituted in the circuit court of a county, or the justice court of a district, in which the defendant, or one of several, or the property, or some of it, may be found.[28] Our Supreme Court has held that since replevin is an action *in rem,* this requirement is jurisdictional, and may not be waived.[29]

In the trial of replevin actions, it is customary to introduce in evidence the affidavit, and the writ with the officer's return thereon, as prima facie proof of the value of the goods.[30] This is obviously sound practice, but, in the absence of other proof, is it necessary to introduce these documents in order to show that one of the defendants or the property was found in the county or justice's district in which the action was instituted? In other words, is it necessary to prove affirmatively the court's jurisdiction? Some practicing attorneys so contend, arguing that since a proper affidavit is essential to confer jurisdiction on the court,[31] the affidavit must be introduced in evidence as proof of such jurisdiction. In like manner, it is

---

[25]See note 18 *supra* and note 26 *infra.*

[26]137 So. 283, 285. The Florida Constitution uses the words *"demand or value,"* whereas the Mississippi Constitution uses the term *"principal amount in controversy."*

[27]Miss. Code § 2841 (1942).

[28]*Id.* § 2843.

[29]Fitzgerald v. Williams, 136 Miss. 250, 101 So. 370 (1924); Stanley v. Cruise, 134 Miss. 542, 99 So. 376 (1924).

[30]Miss. Code § 2848 (1942).

[31]Herrington v. Stimpson Co., *supra* note 14.

argued, the writ, with the officer's return thereon, must be introduced in order to prove that the court acquired jurisdiction over the res.[32]

We submit that it is not necessary to introduce such documents in evidence (although to do so is both simple and safe). In the first place, it will be presumed that a court of general jurisdiction has jurisdiction to hear the cause, unless the contrary appears in the record.[33] In addition, it appears that such documents, when filed, become part of the record,[34] and may be noted on appeal;[35] therefore, if the affidavit together with the writ and return are in order, we do not believe that failure to place such documents in evidence constitutes reversable error.

The writ is executed by seizing the property and summoning the defendant,[36] and Sections 2849, 2851, and 2852 control the possession of the property after seizure by the officer. After execution of the writ, the plaintiff must file his declaration and the defendant must thereupon plead, but the enactment of the 1948 statute[37] abolishing pleas in circuit court created a problem as to the proper method of presenting the defense. Under Section 2859,[38] the special statute applicable to replevin, the only plea permitted is that of "not guilty."[39] Under the 1948 general pleading statute, however, "Pleas in circuit court are hereby abolished and every defense heretofore presentable by plea shall be made in an answer." In a recent replevin case,[40] arising after the effective date of the 1948 statute, a default judgment was entered, although a detailed answer had been filed. The plaintiff sought to uphold such procedure by claiming that the defendant's answer was nullity; that the plea of "not guilty" was the only plea permitted. The Supreme Court sidestepped a positive decision as to whether the defense should be made by plea or by answer by holding the answer sufficient under Section 2859, since it denied that the plaintiff was entitled to possession of the property. It is, therefore, clear that an answer

---

[32]An entry of appearance by the defendant will give the court jurisdiction over the person of such defendant, but will not confer jurisdiction over the res in the absence of seizure of the property prior to the trial. Van Norman v. Van Norman, 210 Miss. 105, 48 So.2d 633 (1950); MISS. CODE § 2846 (1942).

[33]Brown v. Bd. of Supervisors, 171 Miss. 586, 158 So. 344 (1934).

[34]MISS. CODE § 1639 (1942) provides that in circuit court cases "all pleadings and all papers filed or introduced in the case . . . shall constitute the records."

[35]The affidavit is part of the record and can be noted upon demurrer. Martin v. Coker, 204 Miss. 576, 37 So.2d 772 (1948), citing Newell v. Newell, 34 Miss. 388 (1857).

[36]MISS. CODE § 2846 (1942).

[37]*Id.* § 1475.5.

[38]"The defendant may plead that he is not guilty of the premises charged against him, and this plea shall put in issue not only the right of the plaintiff to the possession of the property, but also the wrongul taking and detention, or wrongful detention thereof, as the case may be."

[39]Porter Hardware Co. v. Peacock, 129 Miss. 129, 91 So. 856 (1922); Munn v. Potter, 111 Miss. 180, 71 So. 315 (1916); Bennett v. Holloway, 55 Miss. 211 (1877).

[40]McCaskill v. Little, 58 So.2d 801 (Miss. 1952).

is sufficient if it denies plaintiff's claim to possession, no particular form of plea being required by Section 2859,[41] but the question of applicability of the 1948 pleading statute remains unsettled.[42]

At common law, the action of replevin involved only the plaintiff's right to immediate possession, and frequently left undetermined various rights of the parties arising out of the wrongful taking or the wrongful taking and detention of the property.[43] For example, a successful defendant was in some cases forced to institute a separate action to regain possession of the property or to recover the value thereof if possession could not be restored.[44] Our statutes were designed to settle all rights of the parties arising out of the wrongful taking or detention of the property. In order to accomplish this, the statutes provide for entry of alternative judgments for the return of the property or for the payment of the value thereof, in addition to damages for the wrongful taking and/or detention or for the wrongful suing out of the writ.[45] Various problems can arise, however, when the unsuccessful party has possession of the property. When does the alternative feature of the judgment apply, or, in other words, who has the option of satisfying the judgment by payment of the value of the property itself?

Considering first the successful litigant, it seems clear that he does not have the right to demand payment of the value of the property in lieu of accepting delivery of the property itself, where delivery can be made.[46] The judgment is entered against the unsuccessful party and the sureties on his bond that they restore the property to the successful party "if to be had, or pay him the value thereof."[47] From the wording of the judgment, therefore, it would appear that delivery of the property should certainly constitute satisfaction of the judgment. To hold otherwise would require a party to assert a good-faith claim to possession at the peril of

---

[41] *Ibid.* In Scott v. McClinton, 58 So.2d 913 (Miss. 1952), the defendant filed a plea of general issue with notice of affirmative matter. The 1948 statute was apparently not then in force, but this is another indication of the Mississippi Court's liberal attitude toward the form of pleadings.

[42] For example, the plea of "not guilty" has heretofore been equivalent to a plea of the general issue as a general traverse (Munn v. Potter, *supra* note 39), but now, will averments of fact in the declaration be taken as admitted if not denied by answer? Until these questions are settled by the Supreme Court or the legislature, it appears that the only safe procedure is the filing of an answer that clearly complies with both statutes.

[43] 46 Am. Jur., Replevin § 122.

[44] *Id.* §§ 122, 127.

[45] Miss. Code §§ 2860, 2861, 2862 (1942). In addition, if the officer fails to seize the property, but does summons the defendant, the plaintiff may prosecute the action as one for damages for the wrongful taking or detention. *Id.* § 2857.

[46] Am. Jur., Replevin § 132; Annotation, 170 A.L.R. 122, 124.

[47] Miss. Code §§ 2860, 2861 (1942). The judgment may also include damages for the wrongful taking and/or detention or, if for the defendant, for the wrongful suing out of the writ, as assessed by the jury.

being forced to "buy" the property if judgment went against him.[48] Of course, if the property cannot be restored, execution for the value of the property can be demanded, and this right applies even though the property can be delivered but in a practically worthless condition.[49]

Replevin being essentially a possessory action, it would appear that the unsuccessful party certainly should not have the option of retaining possession by forcing the successful litigant to accept payment for the property, since the court has adjudicated such possession to be wrongful.[50] Again, the wording of the judgment, as provided by statute, seems to require delivery of the property "if to be had"—the alternative money judgment being applicable only when delivery cannot be had. The statute on execution supports this view.[51] Several cases, however, have held that an unsuccessful defendant does have the option of surrendering the property or paying the value thereof.[52] These cases are of two types, and we believe they can be reconciled with the general rule. First, there are the decisions involving property which has been changed in form; for example, timber cut into logs or staves.[53] In such cases a return of the property in its original condition is impossible and a return in its converted state would greatly enrich the plaintiff. In such cases the court has permitted the defendant to retain the property and pay the plaintiff damages therefore.[54] Although such cases were actions of replevin, we submit that replevin should not lie in such cases;[55] that replevin is not proper in any case in which the plaintiff is not entitled to immediate possession of the property levied upon; and that, in these cases, the court simply exceeded the bounds of this statutory remedy, in order to reach a just result, by entering judgment for the plaintiff but giving to the defendant the option of retaining the property upon payment of the assessed value thereof.

The other cases which might appear to be in conflict with the general

---

[48]The fact that such party posted bond for possession of the property should have no bearing on this issue, since the bond does nothing more than control the possession pending the litigation.

[49]See, *e.g.*, Haslett v. Witherspoon, 25 So. 150 (Miss. 1899), where, pending trial, the property was severely damaged by fire. *Cf.* Moody v. Citizens' Sav. Inv. Co., 135 Miss. 403, 99 So. 817 (1924). See also George v. Hewlett, 70 Miss. 1, 12 So. 855 (1890), overruling Whitfield v. Whitfield, 44 Miss. 254 (1870), and McPherson v. Acme Lbr. Co., 70 Miss. 649, 12 So. 857 (1893), where the property was destroyed by fire.

[50]This is the general rule. See Annotation, 170 A.L.R. 122, 123.

[51]Miss. Code § 2863 (1942).

[52]Martin v. Coker, *supra* note 35; Pittman v. Eberhardt Dental Supply Co., 168 Miss. 23, 150 So. 813 (1933); Evans v. Junius Hart Piano House, 140 Miss. 467, 106 So. 9 (1925); Hill v. Petty, 111 Miss. 665 71 So. 910 (1916); Bond v. Griffin, 74 Miss. 599, 22 So. 365 (1897).

[53]Heard v. James, 49 Miss. 236 (1873); Bond v. Griffin, *supra* note 52.

[54]Of course, the measure of damages in such cases is an important question, the answer to which depends upon many factors. See note 53 *supra*. See also I.C. R.R. v. LeBlanc, 74 Miss. 626, 21 So. 748 (1897).

[55]1 Am. Jur., Accession §§ 17, 18, 22.

rule[56] are those where the plaintiff had only a limited interest in the property; for example, where the plaintiff was a trustee under a deed of trust[57] or a vendor in a conditional sales contract.[58] In such cases the alternative provision in the judgment does not require the defendant to pay the full value of the property, but only the value of the plaintiff's limited interest in such property.[59] The court has held that the defendant has the option of paying the value of this limited interest and retaining possession of the property. Again, the result is obviously correct, and, we submit, is actually not in conflict with the general rule, since the plaintiff is rightly entitled to immediate possession, as adjudged, but upon payment for such limited interest in the property, the plaintiff's right to possession terminates and the defendant is thereupon entitled to possession. Instead of requiring the defendant to deliver the property to the plaintiff and then repossess it upon payment of the plaintiff's claim, the court simply determines all the issues in the single proceeding by permitting the defendant to retain the property by discharging the plaintiff's interest therein.[60]

If the plaintiff has obtained possession of the property under bond and if the verdict be for the defendant, the judgment shall be against the plaintiff and the sureties on his bond "that they restore to the defendant the property, if to be had, or pay to him the value thereof and the damages for the wrongful suing out of the writ as assessed."[61] It will be noted that no provision is made for the assessment of the value of a successful defendant's limited interest in the property, as in the case of a successful plaintiff.[62] Apparently, therefore, an unsuccessful plaintiff cannot retain possession of the property by payment of the defendant's limited claim, although we fail to see any justification for the distinction.

---

[56]Pittman v. Eberhardt Dental Supply Co., *supra* note 52, is cited in 170 A.L.R. 122, 124, as being in conflict with the established rule in other jurisdictions.

[57]Hill v. Petty, Martin v. Coker, *supra* note 52.

[58]Pittman v. Eberhardt Dental Supply Co., Evans v. Junius Hart Piano House, *supra* note 52.

[59]Section 2860 so provides. ". . . the judgment shall be that they restore the property . . . or pay him the value thereof, *or of his interest therein, if a limited one,* as assessed by the verdict of the jury. . . ." (Italics added.)

[60]*Cf.* opinion by Chief Justice Campbell in Bates v. Snider, 59 Miss. 497 (1882).

[61]Miss. Code § 2861 (1942).

[62]*Id.* § 2860.

SCIRE FACIAS AND EXECUTIONS

*C. Sidney Carlton**

History

The writ of scire facias is an ancient common law writ which was, during its period of greatest use, a very common and necessary part of judicial procedure. Its use in modern practice in Mississippi has been limited by legislative action, but at the same time its use has been made more definite and precise.

Originally this writ was used at common law only to revive judgments in real actions. At that time, the only remedy by which judgments in personal actions might be revived was by new suit on the judgment, and so, for the sake of establishing uniformity in proceedings and to eliminate delay and expense, the Statute of Westminister 2, 13 Edward. I extended its use to personal actions.[1]

Under the old English practice, the proper judgment on a writ of scire facias was merely the award of execution or of the writ of fieri facias.[2] This narrow limitation of the judgment available was, however, somewhat enlarged in the evolution of the writ, as such enlargement became necessary by extension of the applicability of the writ to other than situations calling only for revival of a judgment.

Under the old English practice, an administrator or other personal representative might revive a judgment obtained by his decedent, as it was held there was privity between the decedent and his representative, but it was held that a judgment obtained by the personal representative, in his fiduciary capacity, could not be revived by an administrator *de bonis non* after death or removal of the original representative. It was held that there was no privity between the two.[3]

However, as the practice and rules of pleadings were gradually liberalized by the courts and by statute, the rules applicable to the writ were made less stringent, and the situations where the writ was applicable were multiplied. Then, as liberalization had caused the expansion of the writ, further liberalization of practice and pleading, as we shall see, has eliminated the writ from use in many of the situations in which it was most frequently used in its earlier day.

---

*Member Mississippi State Bar and Bar Association of Second Judicial District of Tallahatchie County; Carlton & Henderson, Sumner, Mississippi.

[1]Davis v. Helm, 11 Miss. 17 (1844).

[2]Lock v. Brady, 30 Miss. 21 (1855).

[3]New Orleans, J., and G. N. R. Co. v. Rollins, 36 Miss. 384 (1858).

Nature of Scire Facias

It may well be said that the writ of scire facias is many sided in its nature, and because of the many facets of its character, the courts have frequently used inconsistent statements in describing it. We are told that scire facias, "although a continuation of former proceedings, is in reality in the nature of an action."[4] Again, "The scire facias is a new action, of which the original judgment constitutes merely the foundation."[5] But though scire facias is more than the continuation of a former suit and is in the nature of a declaration, its allegations are not, of themselves, sufficient to warrant a judgment by default.[6] We are also told:

> "But where the purpose is to revive a judgment against an executor or administrator, so as to charge the personal representative with the duty of payment, and have the right of execution against the decedent's effects, it is but the continuation of the former suit, and is not an original proceeding."[7]

The most generally noted dual capacity of the scire facias is its service as a pleading or complaint and as process on the party required to answer it.[8] Particularly is this true when it is issued after judgment nisi on forfeiture of recognizance or bond.[9] It is process to bring in a new party to be charged with a judgment, the revival or making final of which is sought, and it is also the declaration or pleading insofar as it is based on the debt, and gives the new party opportunity to show cause why he should not be charged therewith.[10]

In view of its nature and multiple uses, it is not surprising that we are told on occasion that it is a judicial writ, and on others that it is an original writ. And it is sometimes referred to as a writ of execution, when it is issued with the objective of obtaining an execution on a judgment.[11]

It is a common law writ, unknown to chancery. Even this statement, however, is misleading. It is not a chancery or equity writ. But it was a writ proper to the old probate courts of Mississippi, and when these courts were absorbed by our present chancery courts,[12] the procedures of the probate court were carried over, at least as to probate

---

[4]Pickett v. Pickett, 2 Miss. 267, 269 (1836).
[5]M'Afee v. Patterson, 10 Miss. 593 (1844); *accord,* Pollard v. Eckford, 50 Miss. 631 (1874); Bowen v. Bonner, 45 Miss. 10 (1871).
[6]Bowen v. Bonner, *supra note* 5.
[7]Pollard v. Eckford, *supra* note 5.
[8]Vick v. Chewning's Heirs, 31 Miss. 201 (1856).
[9]Tucker v. State, 55 Miss. 452 (1877); Curry v. State, 39 Miss. 511 (1860).
[10]McLeod v. Harper, 43 Miss. 42 (1870).
[11]Bowen v. Bonner, *supra* note 5.
[12]Miss. Laws of 1870 § 25.

matters then pending, into the chancery courts. We thus find a writ of scire facias emanating from a chancery court in at least one instance in this state.[13]

The Writ as Pleading

In considering the requirements of a writ of scire facias as a pleading, we are told by the court that if it is sought to charge a personal representative by reviving the judgment in his name, his representative character must be shown in the writ. It is not enough that the representative capacity might be set up defensively. "A party is never called on to plead, until called on by sufficient allegations."[14] It is necessary to show in the scire facias why the parties are named therein.

If the purpose of the writ is to obtain final judgment against a personal representative in his individual, rather than in his fiduciary, capacity, because of dereliction in the performance of his fiduciary duty, then the writ must show the *devastavit* before final judgment may be entered.[15]

Good practice requires that the writ contain a description of the particular land against which execution is sought, when the purpose is to revive a judgment rendered against one who has since died and whose land has descended to his heirs or devisees. We are told that better practice, however, as well as the old English practice, is that the return of the sheriff on service of the writ contain the description of the land.[16] Such revival is proper against the heirs or devisees without naming the personal representative when the land is properly to be subjected to payment of the judgment, as where the estate has been declared insolvent.

Pleadings to the Scire Facias

The issuance to, and service on, a defendant of a writ of scire facias authorizes a judgment by default in the absence of pleading in opposition thereto, but the types of pleading which are available are limited. Though not so formal as objections by way of plea and defense, a motion to quash the scire facias is procedurally acceptable.[17] When the purpose of the writ is to revive a judgment, either because of lapse of time since it was entered, or because death of a judgment debtor has required a substitution of a new party, the only defenses available must have originated since the entering of the original judgment. Thus, the pleas which

---

[13]Isom v. McGehee's Heirs, 45 Miss. 712 (1871).
[14]See note 4 *supra*, at 269.
[15]Sims v. Nash, 2 Miss. 271 (1836).
[16]Commercial Bank of Manchester v. Kendall, 21 Miss. 278 (1850).
[17]See note 2 *supra*.

are usually available are denial of the judgment, *nul tiel record,* discharge, payment and satisfaction since rendition.[18]

Frequently the scire facias is issued on a recognizance or bail bond for forfeiture after non-appearance of the principal at a term of court as required thereby. In that event a judgment nisi is entered by the court at the time of the required appearance, and the writ is then issued directing service by the sheriff on the principal and sureties on the recognizance or bond, and requiring them to show cause, if any, why the judgment nisi should not be made final against them. In such event a demurrer by the defendants to the writ does not avail them of the indictment, admission to bail, or other prior proceedings of the court relative thereto, since these are held not to be a part of the record on the scire facias. The only way in which such matters may be raised is by plea, with these matters incorporated therein.[19] Nor can objections to the recognizance itself be raised by demurrer after judgment nisi.[20] The usual manner of presenting these matters is by plea of *nul tiel record.*[21]

Process in Scire Facias

When the writ of scire facias is issued, it must be served on the parties sought thereby to be charged. It has been held that if there be more than one personal representative of a deceased judgment debtor, the writ must be served on each.[22] But where were three administrators *cum testamento annexo* and only two were served with the writ, and they failed to raise the question, a judgment reviving the judgment against the estate, and them as the representatives, was, at most, irregular, and not void, and the estate was held thereby to be charged with debt.[23]

Service of the writ on the attorneys who represented the defendant in the original proceeding has been held a valid service.[24] In that case, however, the defendant was a non-resident and was still living. The revival was required because of lapse of time since judgment without issuance of execution.

Service of the writ has always been required in order to charge new parties, except where changed by statute, and this is true as to individuals as well as to the estates of deceased judgment debtors.[25] It was required that all defendants, or their privies, be parties to a scire facias to revive,

---

[18]McLeod v. Harper, *supra* note 10; Langston v. Abney, 43 Miss. 161 (1870).
[19]State v. Rhonimus, 47 Miss. 314 (1872); Fields v. State, 39 Miss. 509 (1860).
[20]Pounds v. State, 60 Miss. 925 (1883).
[21]See notes 19 and 20 *supra.*
[22]Breckenridge's Adm'r v. Mellon's Adm'r, 2 Miss. 273 (1836).
[23]Woodward v. Fisher, 19 Miss. 303 (1848).
[24]Fisher v. Battaile, 31 Miss. 471 (1856).
[25]Bowen v. Bonner, *supra* note 5.

and a discontinuance as to any one was a discontinuance as to all,[26] although failure to raise the question before verdict and judgment cured the defect. The rule was, however, subject to exception. If one of the parties defendant died, the execution issued to all without scire facias, but was levied only on the property of the survivors.[27] This rule is set forth in the statute.[28] No execution could, at common law, be levied on goods of a deceased judgment debtor until revival of the judgment by writ of scire facias, and such writ was issued against the survivors and the personal representative of the judgment debtors. After judgment final on the writ, execution might then issue jointly against the property of the survivors and of the decedent in the hands of his representative.[29] The rule is now set out by statute,[30] and it appears that execution of a judgment for the recovery of real or personal property may be had without revival, just as though the defendant had not died. This statute provides a different rule, however, with reference to judgments for money. It is provided that execution may be obtained "after one year from the death of any defendant" in such judgment "by leave of the court rendering the judgment, or of the judge thereof in vacation, upon cause shown." It seems, therefore, that this statute, as to money judgments, acts to hold the execution in abeyance for one year, but thereafter the only necessity is application to the court. No notice of such application, or process thereon, is required.[31] If the application is made to the judge in vacation, the "cause" referred to in the statute must be shown, but this "cause" does not refer to the application to the court in term time.

It is noted that during this year of delay after death of the defendant in a money judgment, the judgment creditor is not without remedy. Section 1919, Code of 1942, provides:

> "The provisions for the execution of judgments without revival shall not prevent a revival in any case by scire facias."

In this instance, the creditor may properly, and with advantage, resort to the writ of scire facias. A difference is noted, however, between this writ and the application to the judge for execution more than a year after the debtor's death. The writ allows the personal representative to come in and to make defense, within the limits applicable to its use, after service of the writ upon him. This service upon him is required. Under the statutory proceeding, however, no notice or process is required.

---

[26]Bowen v. Bonner, *supra* note 5; M'Afee v. Patterson, *supra* note 5.
[27]Bowen v. Bonner, *supra* note 5; Wade v. Watt, 41 Miss. 248 (1866).
[28]Miss. Code § 1901 (1942).
[29]Bowen v. Bonner, *supra* note 5.
[30]Miss. Code § 1918 (1942).
[31]Alsop v. Cowan, 66 Miss. 451, 6 So. 208 (1889).

The rule requiring service on all parties named in the writ, or explanation thereof, is somewhat relaxed in its application to a writ of scire facias issued on forfeiture of bail bond or recognizance on judgment nisi. The statute[32] provides:

> ". . . upon the return of two writs of scire facias by the proper officer of the county where the bond or recognizance was entered into 'not found,' judgment may be made absolute thereon. . . ."

This provision does not require that two such returns of "not found" be made on the principal before judgment may be made absolute or final as to the sureties who were properly served with the writ, but judgment against the sureties may be made absolute at the return term of the writ despite a "not found" return as to the principal.[33]

Service of the writ is not required to make the personal representative a party, when he comes in voluntarily.[34] An appearance by the attorneys who represented the judgment debtor in the original hearing, moving to quash the scire facias for improper service, amounted to an appearance of the defendant debtor.[35]

A return on the writ showing "executed by personal service" is, it has been held,[36] improper, as the same service is required on a writ of scire facias as on a summons.[37] Likewise, the reading of the writ to the one to whom it is directed is not proper service and a judgment based thereon is bad.[38]

A scire facias was not set aside on the charge that the sheriff who served the process in the original judgment was the same person as the plaintiff, that fact not appearing in the record, but being required to be shown by testimony *aliunde*.[39] Likewise, a judgment on scire facias reviving a judgment as to the debtor's administrator was improper when service was had only by publication.[40] The debtor, in that case, had left the state and then died with no property in this state, and his personal representative was appointed by a foreign court and made no appearance or answer to the writ.

The general procedural rules governing the issuance, execution, and

---

[32]Miss. Code § 2491 (1942).
[33]Saffold v. State, 60 Miss. 928 (1883).
[34]Bowen v. Bonner, *supra* note 5.
[35]See note 24 *supra*.
[36]Davis v. Patty, 42 Miss. 509 (1869).
[37]Miss. Code § 1870, (1942).
[38]Thomas v. State, 62 Miss. 184 (1884).
[39]See note 10 *supra*.
[40]Bowen v. Bonner, *supra* note 5.

return of the writ of scire facias are now governed by statute.[41] The writ may be issued to any county and the rules applicable to execution and return thereof are the same as those applicable to a summons.

Parties

The common law rule was that scire facias was required whenever a new party was to be charged or benefited by the execution of the judgment, but a party was not entitled to be brought in by scire facias if the result of the execution would be neither to charge nor to benefit him.[42] If a sale under execution would affect real property owned by the deceased judgment debtor, scire facias was required to the heirs, but not to the personal representative; but if personal property would be affected, the writ was issued to the personal representative instead of the heirs.[43] A writ issued to the personal representative was not effective to bind the heirs or the property descending directly to them.[44]

Scire facias was necessary to bring in the personal representative, but no such writ was required if the writ of execution emanated or was *tested* in the lifetime of the judgment debtor.[45]

It has been held that the services of scire facias on two of three administrators *cum testamento annexo,* without service on the third, followed by judgment, was, at most, irregular and did not void the judgment.[46]

At common law, no execution could issue in favor of, or against, a person not a party to the original suit and judgment, or made a party by a subsequent proceedings.[47] And a person not a party to the original judgment could not be made a party by a subsequent proceeding unless privy thereto, as an heir, executor, administrator, etc.[48] Originally an administrator *de bonis non* was not privy with an administrator who

---

[41]Miss. Code § 1870, (1942). Specific reference is made to the apparent difference between the rule laid down in this statute: "If the defendant be a non-resident of the state, or cannot be found to be served with the process, the clerk may make publication requiring the appearance of the defendant; and, on proof of publication, the court may proceed as if the writ of scire facias had been served on the defendant," and the rule of Bowen v. Bonner, *supra* note 5, as discussed in the text applicable to *supra* note 40.

[42]Treadwell v. Herndon, 41 Miss. 38 (1866); Davis v. Helm, *supra* note 1; New Orleans, J., and G. N. R. Co. v. Rollins, *supra* note 3; Smith v. Winston, 3 Miss. 601 (1837).

[43]Smith v. Winston, *supra* note 42.

[44]McCoy v. Nichols, 5 Miss. 31 (1839).

[45]Davis v. Helm, *supra* note 1.

[46]Woodward v. Fisher, *supra* note 23.

[47]Treadwell v. Herndon, *supra* note 42; see note 3 *supra.*

[48]Douthit v. State, 30 Miss. 133 (1855).

recovered judgment in his representative capacity, but by statute such privity has now been established.[49]

It was also the rule, at common law, that the terre tenant was a necessary party to the writ scire facias when the object was to subject real estate to execution, but sale without such party was merely voidable without being subject to collateral attack.[50]

If the judgment was rendered against the personal representative in his fiduciary capacity, it was not subject to revival against the heir so as to subject realty thereto, as the heir is not chargeable on such judgment.[51] But if the judgment was rendered against the defendant during his lifetime, the insolvency of the estate and conclusion of the administration does not discharge the debt, and scire facias may then be issued against the heir to subject, to such judgment debt, land inherited by him from the decedent.[52]

Review of Former Judgments

No error in the judgment under which execution is sought may be studied or reviewed on a writ of scire facias,[53] though such error might have been sufficient to reverse the judgment on writ of error or appeal.[54] No defense which was available at the time of the original suit is available as a defense to scire facias on the judgment entered on the original suit.[55] Ordinarily the only defenses available are that the judgment was void, or matters which have arisen since the judgment, such as discharge or payment.[56] The rule applicable to defenses raised by the personal representative is just as for any other party to the scire facias, the court having told us: *"Interest reipublicae, ut sit litium finis."*[57]

Revival of Judgments

Though the statutory provisions of our present code[58] have changed most of the common law rules relative to revival of judgments, these rules are interesting, and on occasion, still applicable.

---

[49]Mayer & Co. v. McLure, 36 Miss. 389 (1858); see note 3 *supra.*

[50]Smith v. Winston, *supra* note 42.

[51]Langston v. Abney, *supra* note 18; Treadwell v. Herndon, *supra* note 42; Foster v. Sumner, 4 Miss. 606 (1844).

[52]See note 16 *supra.*

[53]M'Afee v. Patterson, *supra* note 5.

[54]Langston v. Abney, *supra* note 18.

[55]Pollard v. Eckford, *supra* note 6; Bowen v. Bonner, *supra* note 6; McLeod v. Harper, *supra* note 12; Anderson v. Williams, 24 Miss. 684 (1852); Person v. Valentine, 21 Miss. 551 (1850); Matthews v. Mosby, 21 Miss. 422 (1850).

[56]Roberts v. Weiler, 55 Miss. 249 (1877); McLeod v. Harper, *supra* note 12; Langston v. Abney, *supra* note 21.

[57]See note 10 *supra,* at 50.

[58]Miss. Code §§ 1461, 1560, 1919, 1968 (1942).

The rule formerly was that if no execution was issued on a judgment within a year and a day after its rendition, it was necessary to revive the judgment by scire facias before execution might thereafter issue,[59] but this rule has been changed by statute,[60] and at any time during the validity of a judgment execution may now be issued thereon without revival.

Scire facias was the proper writ for such revival, both as to real actions under the old common law and to personal actions under early English statute as referred to hereinbefore.[61] But such revival was not required if a writ of execution had issued within a year and a day from the rendition of the judgment. Neither was revival against the heir or personal representative of the deceased judgment debtor required if execution on the judgment had issued during his lifetime.[62]

If there were several defendants, the death of one did not require the issuance of scire facias to the survivors, as execution might be issued against all original defendants, with levy thereof had only on the property of the survivors.[63] In such event, appropriate suggestion of death should be made. But revival by writ of scire facias might be had against those in privity with the decedent and chargeable with the debt, and then execution would issue to the survivors and the new parties charged by the writ,[64] but the right to execution against the survivors was not dependent upon bringing in the representatives of the deceased parties.

It is now held to be proper to revive a judgment involving an administrator in the name of the administrator *de bonis non* who succeeded him,[65] though this was not true at common law.

If proper revival by scire facias were not had, execution on the judgment was irregular and could not be allowed to stand and would be quashed on timely motion.[66] However, since the revival against the heirs of the decedent was intended as notice to show cause against the execution, if no cause was available, the heirs had no just ground of complaint, and failure to revive was not error.[67] There appears to be no question, however, that scire facias was the proper remedy against heirs at law when there was an unsatisfied judgment against decedent, and this was

---

[59]Bowen v. Bonner, *supra* note 5.
[60]Miss. Code § 1560 (1942).
[61]See note 1 *supra.*
[62]Thompson v. Ross, 26 Miss. 198 (1853); see note 1 *supra.*
[63]Bowen v. Bonner, *supra* note 6; see note 1 *supra.*
[64]Bowen v. Bonner, *supra* note 6.
[65]Hendrick's Adm'r v. Snodgrass, 1 Miss. 86 (1820); see note 49 *supra.*
[66]Hubert v. Williams, 1 Miss. 175 (1824); Wilson v. Kirkland, 1 Miss. 155 (1824).
[67]Harper v. Hill, 35 Miss. 63 (1856).

true even though the deceased defendant's estate might have been insolvent.[68]

At common law, if the suit had been filed and service had on the defendant, or if judgment had been rendered against him, the issuance of the writ of scire facias against his personal representative immediately became proper on death and appointment of the representative. Though the statute[69] now prohibits suit against the representative for a period of six months, it is held that such prohibition is not applicable to scire facias in either of the situations referred to.[70]

The present rule applicable to the renewal and extension of the general lien of a judgment is that a new suit based on the old judgment must be brought within seven years from its date.[71]

Recognizance

The most frequent use in modern procedure of the writ of scire facias is in connection with forfeitures of a recognizance or bond. The bond in question may be a bail bond, a peace bond, or any bond with a condition. The present procedures and usages are set out in our statutes,[72] but the former decisions are still applicable to the subject.

A recognizance requires an appearance pursuant to its terms. Failure to appear pursuant thereto justifies forfeiture, and it is immaterial to the recognizance that the issue on the indictment is still pending.[73]

Usually when one is served with a scire facias after judgment nisi on a forfeited recognizance, any matters to be presented in defense must be presented by a plea, and not by a demurrer. The usual plea is *nul tiel record*. Only a plea can raise a variance between the writ and the recognizance as to the date of the required appearance,[74] or raise any matter based on the proceedings of the court in the matter of the indictment or admission to bail,[75] or present the fact that the writ named an erroneous date of entry of the judgment nisi.[76] A demurrer will not present any one of these questions.[77] This is because these records are not deemed to

---

[68]See note 16 *supra*.
[69]Miss. Code § 612 (1942).
[70]See note 22 *supra;* Pollard v. Eckford, *supra* note 5; Rosenthal v. Enevoldsen, 61 Miss. 532 (1884).
[71]Miss. Code § 733 (1942); Buckner v. Pipes, 56 Miss. 336 (1879).
[72]Miss. Code §§ 1471, 2491, 2592 (1942).
[73]Ditto v. State, 30 Miss. 126 (1855).
[74]*Ibid.*
[75]See note 19 *supra*.
[76]Marx v. State, 61 Miss. 478 (1884).
[77]See note 20 *supra;* State v. Rhonimus, *supra* note 22.

be a part of the record on scire facias. Even the bond or recognizance itself is not deemed a part of such record.[78]

Amendment of the writ is allowed after service thereof to make it conform to the recognizance on which it was issued,[79] but while the naming of the erroneous date of the judgment nisi in the writ is also an amendable defect, in the absence of amendment judgment against the surety could not stand.[80]

One service of the writ is all that is required on the surety, and judgment may be entered thereon against him, though only one return of "not found" has been made as to the principal,[81] and failure to dismiss as to the principal is not error as to the surety.[82] Judgment may be taken against one surety and at the same term the state may dismiss or fail to proceed as to other sureties and the principal.[83]

Under Section 2491, Code of 1942, no service is required on the principal to authorize judgment if there be two returns of "not found" made as to him. Judgment by default on only one such return, however, is erroneous.[84]

Since most of the proceedings involving a variance in different steps of the proceedings in scire facias arise in connection with recognizances, we will consider, at this point, what the court has determined to be a fatal variance. As we have seen, a plea and not a demurrer is required to reach the error of variance. It has been held to be a fatal variance when the judgment nisi recited failure to answer a grand jury call and the writ recited failure to appear on being found guilty;[85] when the judgment nisi referred to one John W. Douthit, and the scire facias referred to one Richard B. Douthit;[86] when the writ failed to show the requirement of the recognizance to appear at a given term "and from day to day, and term to term, until regularly discharged;"[87] when the writ of scire facias named an erroneous date as that of the judgment nisi;[88] and when the final judgment incorrectly recited the date of the judgment nisi.[89]

A final judgment for a larger sum than recited in the scire facias, although for the amount specified in the recognizance, is a fatal variance.[90]

---

[78]Smith v. State, 76 Miss. 728, 25 So. 491 (1899).
[79]Curry v. State, *supra* note 9.
[80]See note 76 *supra*.
[81]See note 33 *supra*.
[82]Thompson v. State, 7 So. 403 (Miss. 1890).
[83]See note 76 *supra*.
[84]See note 78 *supra*.
[85]Bridges v. State, 24 Miss. 153 (1852).
[86]See note 48 *supra*.
[87]Tucker v. State, *supra* note 11.
[88]See note 76 *supra*.
[89]See note 78 *supra*.
[90]See note 73 *supra*.

Some of these errors, however, might have been eliminated by amendment in the lower court, had leave to do so been requested.[91] Amendment below was also proper when the recognizance and judgment nisi referred to "Cluff Sims" and the scire facias referred to "E. Cluff Sims."[92]

We note, also, that in some instance, a variance is not fatal. After judgment by default, on a scire facias, a variance between the recognizance and the writ may not be noticed.[93] In another case,[94] the judgment nisi referred to the instrument as a recognizance when it was, in fact, a bond. Scire facias issued. Service of the writ was secured and final judgment entered, with the nisi being amended to show it was entered on a bond. It was held that the final judgment was good on collateral attack and that equity would not interfere to enjoin execution of the judgment.

Scire Facias Ad Audiendum Errores

Under modern practice in Mississippi, this type of writ of scire facias is no longer required, though its use is possible under our present statute.[95] It is used after the assignment of errors by the appellant on appeal to the Mississippi Supreme Court. It is not required if a party to the appeal voluntarily appears, but if used, it is for the purpose of affording notice of the pendency of the writ of error to the appellate court after death of a party to the appeal.[96]

Other Modern Uses for Scire Facias

In addition to the uses hereinbefore suggested, our present statutes indicate the use of the writ of scire facias in two other general classes of situations.

Upon failure of certain officials to discharge particular duties, the writ may be used to levy penalties or fines therefor. In such instances, the practice is similar to the practice upon forfeiture of bond. A judgment nisi is entered, the writ issued and served, and the judgment is made final or vacated at the return term of the writ. Failure of a justice of the peace to attend a court of unlawful entry and detainer when his attendance is required authorizes the levy of a fine and scire facias thereon.[97] Like procedure is applicable to enforce attendance of all county and county district officers at each session of the circuit court,[98] and to enforce

---

[91] See note 76 *supra;* Tucker v. State, *supra* note 11.
[92] See note 20 *supra.*
[93] See note 33 *supra.*
[94] State v. Ricketts, 67 Miss. 409, 7 So. 282 (1890).
[95] Miss. Code § 1968 (1942).
[96] See note 3 *supra.*
[97] Miss. Code § 1037 (1942).
[98] *Id.* § 1783.

the discharge of the duties of his office by any member of the board of supervisors.[100]

The other general class referred to is the use of the writ to punish failure of private citizens to discharge their duties in connection with the operation of our courts. Failure to honor a *venire facias* for jury service authorizes use of the writ,[101] and likewise the use of the writ is indicated when an individual fails to honor a witness *subpoena*.[102] A separate statute is provided for use of the writ upon failure of a witness to honor a *subpoena* when issued from a justice court.[103]

Void or Voidable Executions

If revival by scire facias of a judgment is required, either because of lapse of time or because of a need for the substitution of new parties, and an execution is issued without such revival, it may be quashed on timely motion,[104] but a completed execution thereunder cannot be collaterally attacked.[105] Before the actual sale under such writ of execution, or before rights thereunder have become fixed, an execution bearing *teste* dated after the death of the judgment debtor will be quashed or set aside.[106]

After a sale under the execution has resulted in the fixing of rights in the purchaser, such a failure to revive is uniformly held to be, at most, an error making the sale voidable. It is not void, and may not be attacked collaterally.[107] It thus, in effect, becomes a valid sale for most purposes.

Failure to Sell After Levy on Execution

If a valid execution is issued and the sheriff or other appropriate officer levies on property of the judgment debtor, but either fails to offer it for sale, or offers it for sale and fails to sell it, he properly retains possession thereof. Application is then made to the clerk for a writ of *venditioni exponas* to authorize and direct the officer to sell such property.[108] The property is then sold under this writ rather than under the original execution, and proper report thereof made to the court as in other cases.

---

[100] *Id.* § 9819.
[101] *Id.* § 1777.
[102] *Id.* § 1889.
[103] *Id.* §§ 1817, 1818, 1819.
[104] See note 66 *supra.*
[105] See note 3 *supra;* Mitchell v. Evans, 6 Miss. 548 (1814).
[106] Harrington v. O'Reilly, 17 Miss. 216 (1848).
[107] Hughes v. Wilkinson's Lessee, 37 Miss. 482 (1859); see note 67 *supra;* Hodge v. Mitchell, 27 Miss. 560 (1854); Shelton v. Hamilton, 23 Miss. 496 (1852); see note 106 *supra.*
[108] Shelton v. Hamilton, *supra* note 107; Locke v. Brady, *supra* note 3.

Conclusion

In practice, the use of the common law writ of scire facias was required in many needlessly complex situations. As a tool for doing the required things it was quite satisfactory, but many of the things which were required were unnecessary or needlessly complex. The result has been that legislative action has reduced the situation to which the writ is the only procedural device applicable, and a resulting decrease in the use of the writ has ensued.

It might even be said that in most instances today, the propriety of the use of the writ is governed by statute, but the rules applicable to such use in this state are still those of the common law.

The writ itself is not difficult of use. With its uses and propriety now governed by statute, it is submitted that it should be beneficially used by the practicing lawyers of the state.

WRIT OF SEIZURE

Richard E. Stratton, III *

As far as the writer is able to ascertain, the earliest legislative enactment providing for a proceeding by writ of seizure in Mississippi was passed under the Act of April 5, 1872, entitled, "An Act to Secure the Payment of Wages for Labor and Liabilities for Supplies."[1]

Section 1 of the act provided for a lien upon agricultural products to receive payment for labor done in raising the agricultural products. The lien was against all landlords, sub-lessors, and all other persons interested in such agricultural products. Section 10 provided for a lien in favor of employers for provisions, clothing, plantation supplies and money furnished such laborer.

In *Hester v. Allen*[2] the defendant in error instituted a suit for wages as overseer on the plantation of the plaintiff in error, and by writ of seizure sought to assert said claim for wages against the crop of the plaintiff in error. The claim was based on the Act of 1872 as amended in 1873.[3] It was held that these statutes were intended only to grant liens upon crops for certain classes enumerated therein, employer and employee, landlord and tenant, the cropper on shares and the supply man and the party supplied. The Mississippi Supreme Court held that an overseer clearly did not come within these classes.

Afterwards, apparently in view of this decision, the law was amended by adding the words, ". . . or any other person who may aid by labor to make, gather or prepare for sale or market any crop. . . ."[4] Again the question was raised whether an overseer or manager of a farm was entitled to a lien upon a crop grown under his supervision.[5] The Mississippi Court found that the amendment extended the lien "by the most comprehensive language" to persons to whom the former law did not apply, and said that the inference was that the language was added to include persons not previously covered, and that no class more naturally fell within the scope of the added language than that to which the plaintiff belonged.

It is interesting to note that the Court has qualified the manner and time of supervision by an "overseer or manager." In *Terry v. Groves*[6] the overseer of a place in LeFlore County on one occasion supervised

---

*Jones & Stratton, Brookhaven, Miss.
[1]Laws of 1872, c. 107.
[2]52 Miss. 162 (1876).
[3]Laws of 1873, c. 75.
[4]Miss. Code § 1360 (1880).
[5]Weise v. Rutland, 71 Miss. 933, 15 So. 38 (1894).
[6]71 Miss. 539, 14 So. 451 (1893).

some work done by laborers sent from that place to one across the Tallahatchie River, where he repaired a gin-stand. The Court said that the character of his service was not sufficient to place him in the position of an employee or laborer on the latter place, so as to give him a lien on the crops grown there.

It is entirely possible that these decisions are directly responsible for the insertion of the words "overseer or manager" by the legislature in the Laws of 1894.[7]

Although a wagehand or general laborer has his services utilized other than in making, gathering and ginning cotton, our Court has held that nevertheless he has a right to enforce his entire wages against cotton which the laborer assisted in making, gathering and ginning.[8]

In *Erwin v. Miller*[9] one Donnell carried his cotton as it was gathered to the gin of Erwin, where it was prepared for market and charges made for the ginning. Erwin did not assert his lien against each bale as it was ginned, but permitted Donnell to ship the cotton to one Fulmer, beneficiary under a deed of trust upon the crops of Donnell. Erwin held the last five bales in payment of the total account due him by Donnell. The trustee of the aforementioned deed of trust obtained the cotton in question from the railroad agent and shipped it to Fulmer, tendering to Erwin the amount of the charges for the ginning of those bales. Erwin declined the offer and sued out a writ of replevin for the cotton (apparently unmindful of the writ of seizure provided for by the statute). Counsel for the appellee, the trustee, argued that Erwin had only a common law lien for the price charged for the use of his machinery, and not a statutory lien for labor done.[10]

The Mississippi Court held that neither the letter nor the spirit of the statute confined its operations to those agricultural laborers who engaged in planting, cultivating, gathering and preparing the crops, but extended also to any persons who aided by their labor to make, gather, or prepare for market any crop. The Mississippi Supreme Court felt it unreasonable to suppose that the statute intended to give a lien for the labor expended before the ginning and exclude the ginner, leaving him only to his commno law lien.

---

[7]Miss. Code § 3042 (1906).

[8]Lumbley v. Thomas, 65 Miss. 97, 5 So. 823 (1887). From this case the writer draws the inescapable conclusion that where a laborer is hired for $300 a month, and only a part of his duties concern the making and gathering of a crop, notwithstanding that fact, his entire wages would be a lien against that crop. This does not appear equitable, but in view of the fact that there would be much difficulty in apportioning these wages and establishing a lien in accordance with the apportionment, the decision will likely withstand attack.

[9]72 Miss. 174, 16 So. 678 (1894).

[10]Such lien was then appearing as Miss. Code § 2682 (1892).

These statutes, read in their broadest sense, give a lien on the whole crop for work done on any part of it, and such interpretation has been applied in the case of a laborer.[11] In the above case a more restrictive construction upheld the lien of the ginner as to the bales he had ginned, but did not extend to other cotton not prepared for market by the owner of the gin.

The Mississippi Court held that a mortgage on a crop executed after the passage of the Act of April 5, 1872, became and was subordinate to the right of the mortgagor to hire laborers, and therefore created on behalf of such laborers a lien superior to the lien of the mortgage, though the employment was subsequent to the execution of the mortgage.[12]

Subsequently, the Court announced that a laborer's lien could be waived by him. Since it might arise out of a parol contract, it might be surrendered in the same way. Thus, a laborer who had waived the security provided by law could assign no right to another. The assignee of a laborer or an employer's lien is subject to the doctrine of *caveat emptor*.[13]

Waiver is the intentional relinquishment of a known right.[14] The question of waiver is one of fact for the jury and all testimony illustrative of this intent, whether written or parol, should be received in order to determine the consent of the laborer to waive his lien.[15] Further, interpretation of an agreement in writing between the laborer and employer, where the writing is unaffected by parol testimony, is within the province of the judge, but its effect as evidence of a collateral fact, such as waiver, is for determination by a jury.

That "The laborer is worthy of his hire" has been engrafted into our law; but the law goes further and says that no one shall prevent the laborer from receiving the same.[16]

Where an overseer or manager of a plantation, on which cotton was raised under his management, shipped such cotton for the purpose of its being sold on the market, he waived his statutory lien and is estopped to assert the lien, which he once had but lost by virtue of own act.[17] The conduct of the holder of the lien may seem to indicate that he consents to

---

[11]See note 8 *supra*.
[12]Buck v. Payne, 50 Miss. 648 (1874).
[13]Powell v. Smith, 74 Miss. 142, 20 So. 872 (1896); Eason v. Johnson, 69 Miss. 371 (1891); Newman v. Bank, 66 Miss. 323 (1889); Buck v. Payne, 52 Miss. 271 (1876).
[14]28 Am. & Eng. Encyc. of Law 526.
[15]Powell v. Smith, *supra* note 13.
[16]Warren v. Jones, 70 Miss. 202, 14 So. 25 (1892).
[17]McCormick v. Blum, 75 Miss. 81, 21 So. 707 (1897).

a disposition of that on which his lien attached, and by his conduct he waives the lien.[18]

The present statute on liens between employer and employee, Section 336, Mississippi Code of 1942, is practically the same as the statutes in effect when the above discussed cases were decided.

Section 337, Mississippi Code of 1942, provides for a purchase-money lien on personal property. The first statute with reference to purchase-money liens is found in the Code of 1880.[19] It was enlarged by Chapter 77, Laws of 1884, and took on the form in which it has appeared ever since.

The Mississippi Court held that the statute applied to all personal property, the purchase price of which had not been paid, and its object was to afford a remedy to the seller by which the property might be seized and subjected to a judgment in his favor for the unpaid price. The Court rejected the argument that the amendment in 1884 had reference alone to property which was by law exempt from execution and sale; it held that this act operated in favor of the seller, regardless of the character of the property as exempt or not exempt under the general laws so long as it remained in the hands of the first vendee.[20]

The statute, as amended in 1884, did not create in favor of the creditor a lien existing from the date of the sale of the property, but conferred only the right to acquire a lien by seizure of the property while in the hands of the first vendee. Further, it gave the creditor no right or equity in or to the property, but only the right to go against it for the unpaid price in conformity to the provisions of law.[21] Furthermore, such remedy could not be enforced against the personal property in the hands of an assignee or a receiver appointed at the instance of another creditor of the vendee where said creditor previously acquired a lien by virtue of a creditor's bill.[22]

Our Court has often failed to draw a distinction between a statutory lien of a materialman and the statutory lien for purchase money.[23]

Where there is an unrecorded deed of trust in favor of a third party

---

[18]Williams v. Delta Groc. Co., 159 Miss. 575, 132 So. 732 (1931) (wherein the lien of an assistant manager or overseer was held to be waived by a course of dealing showing consent to disposition of cotton crop); Quiver Gin Co. v. Looney, 144 Miss. 709, 111 So. 107 (1926) (where appellant ginned cotton, delivered it to the compress and gave to the owner a gin ticket, such handling of the cotton was held to constitute a waiver of his lien). *But cf.* Jackson v. Jefferson, 171 Miss. 774, 158 So. 486 (1934).

[19]Miss. Code § 1255 (1880).

[20]Frank v. Robinson, 65 Miss. 162, 3 So. 253 (1887).

[21]*Ibid.*

[22]*Ibid.*

[23]Kingsland & Douglas v. Massey, 69 Miss. 296, 13 So. 269 (1891).

on property sold to the purchaser on credit without reservation of title, and a writ of seizure is executed, but the property is returned upon the making of proper bond, the seller who had no notice of the deed of trust has a lien superior to rights under the deed of trust.[24] A sale under deed of trust would be void because subsequent to the acquisition of the purchase-money lien by the levy of the writ of seizure.

The case of *Campbell Paint & Varnish Co. v. Hall*[25] held that the purchase-money lien statute gives the seller a lien on the goods sold by him to a merchant for the purpose of resale, and the seller does not waive his lien by mere knowledge that the goods are intended for resale. The Court rejected an argument that such a construction would render that statute inconsistent with the statute providing that it shall be illegal to sell personal property upon which there is a lien by contract or by law, without informing the person to whom it was sold of the existence of the lien.[26]

The same case also held that where the holder of a purchase-money lien enforced his lien by a writ of seizure, and later a bankruptcy proceeding was instituted, the lien of the seller of the goods was paramount to the rights of the trustee in bankrupcty. The Court stated, however, that if the seller had taken no steps to enforce his lien at the time of the bankruptcy proceeding, and the goods on which the lien was claimed were found in the possession of the bankrupt, the trustee would take the goods free from the purchase-money lien.

When the seller sells personal property to a purchaser who had, previous to that time, executed a deed of trust which, by its terms, provided for a lien on all after-acquired property during a stated period, not to exceed twelve months,[27] the claim thus arising is superior to the seller's purchase-money lien.[28] In such a case the Mississippi Court says that other creditors are charged with notice under such a deed of trust, and so their claims should be subordinate.

---

[24]Fidelity & Deposit Co. of Md. v. Sturtevant, 86 Miss. 509, 38 So. 783 (1905).

[25]131 Miss. 671, 95 So. 641 (1923).

[26]MISS. CODE § 2151 (1942). The Court's explanation was that the seller has at least tacitly agreed to the resale of the personal property by virtue of his knowledge that they were bought for that very purpose, and the purchaser thereof would receive no entry, because under the statute he acquired a perfect title, free and clear of the lien. The Court distinguished the statutory purchase-money lien from a mortgage on a stock of goods intended for resale, recognizing that the Court had often held that such a mortgage was void as to creditors. They are of different character because the seller has a lien alone on the goods sold, while the mortgagee has a mortgage either on the whole or a part of the mortgagor's stock of goods, and the mortgage may in that instance be for the purchase money of those goods or not. Further, the Court answered that the legislature has the power to make a mortgage by a purchaser to the seller to secure the purchase price valid as between parties as well as against creditors of the purchaser.

[27]The statute which regulates such a deed of trust presently appears as MISS. CODE § 851 (1942).

[28]Tabb v. People's Bank, 160 Miss. 22, 133 So. 137 (1931).

The case of *Frank v. Robinson*[29] was decided under Chapter 77, Laws of 1884, which reads in part as follows:

> "And if the plaintiff shall desire to establish a lien on such personal property whilst in the hands of the first vendee, he shall on filing his declaration or evidence of debt, etc."

The Mississippi Supreme Court held that clearly this statute did not create a lien in favor of the seller from the date of the sale of his property, but only conferred upon him the right to acquire a lien thereon by seizing it under judicial process while in the hands of the first vendee.

The case of *Goodbar v. Knight*[30] was decided under Section 2719, Code of 1892, which reads:

> "The lien for the purchase-money of personal property shall only attach whilst the property remains in the hands of the first purchaser."

The Court held that the interpretation in the *Frank* case was also proper in the *Goodbar* case; that the effect of the statutes was the same in that respect.

The wording of the present statute[31] is different:

> "The vendor of personal property shall have a lien thereon for the purchase-money while it remains in the hands of the first purchaser, etc."

The language of this statute was given interpretation in *Weiss, Dreyfous & Seiferth, Inc. v. Natchez Investment Co.*,[32] where the Court said the statute undoubtedly creates a lien on the property from the time of its sale, to continue so long as it remains in the hands of the first purchaser, or those deriving title or possession through him, with notice that the purchase money was unpaid; not merely the right to acquire a lien by the seizure of the property under judicial process.

Under this interpretation, when the purchaser in the above case went into receivership, the property coming into the hands of the receiver remained subject to the lien for the purchase money thereof, for the reason that the receiver takes property subject to all valid existing liens thereon.

It is to be especially noted that the purchaser executed chattel mortgages on all the property in favor of another party, and the Court said

---

[29]See note 20 *supra*.
[30]89 Miss. 124, 42 So. 539 (1906).
[31]Miss. Code § 337 (1942).
[32]166Miss. 253, 140 So. 736 (1932).

that when the lien of these deeds of trust attached, the property was and thereafter remained in the possession of the purchaser, from which it followed that the deed of trust was subordinate to the lien of the purchase money, because the rule almost universally is that a prior lien gives a prior legal right to satisfaction.

Under our law there are no exemptions of personal property as against purchase-money liens.[33]

A statutory purchase-money lien is not waived by taking as security a conditional sales contract on the personal property. The two are not inconsistent, and may co-exist on the same property.[34] The party may elect to invoke the remedy of replevin under the conditional sales contract or the remedy of writ of seizure under the purchase-money lien. The seller may take his choice.[35]

Where a mechanic having a lien under Section 353, Code of 1942, surrenders possession of the personal property, he may still retain a lien to the extent that is allowed in the case of liens for purchase money of goods.[36]

The case of *Billups v. Becker's Welding Co.*[37] was a case where a deed of trust was executed on the personal property after a mechanic's lien had attached to the property. The mechanic did not keep the property in his possession. The Court held that the mechanic's lien would prevail unless the beneficiary of the deed of trust could prove two things: first, that the beneficiary did not have notice of the mechanic's lien, and second, that the lien at the time the writ of seizure was issued remained unsatisfied. Since it would have been unlawful for the owner of the property to have obtained a loan and have given a lien in favor of the beneficiary of the deed of trust without advising the beneficiary of the existence of a lien then outstanding, the presumption was that the owner did inform the beneficiary of the outstanding lien.

A personal property lien suit may be filed at any time short of the general statute of limitations, so long as during that time the property

---

[33]Platte Fisheries v. Wadford, 170 Miss. 617, 155 So. 161 (1934).

[34]Superior Laundry v. Am. Laundry Machine Co., 170 Miss. 450, 155 So. 186 (1934).

[35]Thompson v. Hill, 147 Miss. 489, 112 So. 697 (1927). This case also holds that a statutory lien is not waived by taking other security, unless the security taken is inconsistent with that given by the law. A landlord selling personal property to a tenant for use on the leased premises did not, by taking a chattel mortgage on the property, waive the statutory landlord's lien on the crops raised on the leased premises, or a statutory purchase-money lien on the property itself for the balance of the purchase price.

[36]He may enforce the same in like manner as is provided in MISS. CODE § 341 *et seq.* (1942). Billups v. Becker's Welding Co., 186 Miss. 41, So. 526 (1939).

[37]186 Miss. 41, 189 So. 526 (1939).

remains in the hands of the original lienor or one deriving title or possession through him, with notice that the lien money was unpaid.[38]

In *Dorsey v. Latham*[39] the appellant sold and delivered automobile trailers on deferred payments. The purchaser did business in a building leased by it from the appellee, and placed the trailers therein without any sign indicating that the appellants had a lien of any sort on the trailers. Prior to the purchase of these trailers, the purchaser owed the appellee for five months unpaid rent. Appellee had the trailers seized under an attachment for unpaid rent. The trailers were removed and advertised for sale under the warrant of attachment. Before a sale was consummated, the original purchaser of the trailers filed a petition in bankruptcy. The bankruptcy court restrained the sale and had the trailers delivered to the trustee in bankruptcy, who sold them under the provision that any liens be tranferred to the proceeds of the sale. Notice was given at the trustee's sale of the appellee's claim to a lien for rent, but no notice was given on behalf of the appellant, although the trustee knew of appellant's claimed lien.

The Mississippi Supreme Court held that while the trailers remained in the hands of the purchasers, appellants had a purchase-money lien thereon, and it continued on and attached to the money paid by the trustee in bankruptcy as a result of the sale. The lien for rent was subordinate to the appellant's purchase-money lien, the *Weiss* case[40] being cited as authority. The Court said that the sign statute[41] did not derange the priority of liens among the creditors of persons transacting business.

The most important feature of the case is that the removal of the trailers from the possession of the purchaser did not affect the appellant's purchase money lien, because neither the purchaser nor the appellant did anything in the furtherance of this removal so as to constitute a delivery of possession to a third person, without notice that the purchase money remained unpaid on that date.

---

[38]Hamilton Bros. Co. v. Baxter, 188 Miss. 610, 195 So. 335 (1940). A suit was filed in circuit court by the holder of a mechanic's lien, and an ordinary summons was issued. Subsequently, the lien of a prior deed of trust was foreclosed and the property sold to a third person. Then an amendment was filed, asking that the original mortgagee and the purchaser at the foreclosure sale be made parties defendant to the suit and the lien be enforced against the personal property in the hands of said purchaser. The court said that the mere filing of a suit and ordinary summons does not operate as constructive notice to subsequent purchasers under the general doctrine of lis pendens, and that the statute requires more to be done if personal property itself is to be looked to or pursued, and that the proper method is the issuance of a writ of seizure, which is the statutory equivalent of the lis pendens notice. Further, the court said that to defend as an innocent purchaser without notice of the lien, it must be affirmatively declared and the party asserting it must bear the burden of establishing it, unless otherwise it is shown.

[39]194 Miss. 253, 11 So.2d 897 (1943).

[40]See note 32 *supra*.

[41]Miss. Code § 273 (1942).

Watson v. Broadhead[42] held that an assignee of a deed of trust on a truck was not in possession of the truck, and title to said truck had not vested in the assignee because the deed of trust had not been foreclosed and no breach of condition thereof had appeared. Therefore, a mechanic's lien incurred subsequent to the deed of trust was held to be prior in its nature to the lien of the deed of trust.

The case was distinguished from the *Billups* case, the Court saying:

> "For whether or not the deed of trust there under condition conferred on its holder title to the property covered by the deed of trust, was not there discussed or decided. The case was presented to the Court by counsel and decided by it on the assumption that the deed of trust there involved had priority over the claimed mechanic's liens, unless the holder thereof had notice of the lien when she obtained the deed of trust."[43]

Where a person's only lien or claim upon personal property as security for a debt is the statutory purchase-money lien, this lien is enforceable only in the manner prescribed by the statute providing for the issuance of a writ of seizure.[44]

Section 338, Code of 1942, provides a lien for sawmill and planing mill employees and timber laborers. This lien was originally enacted in 1908.[45] Section 2 of the statute provided that the lien might be enforced in the same manner as the lien for purchase money was enforced. In 1922 the duration of this lien was extended from three months to six months.[46] Chapter 44 of the Code of 1930 re-codified the entire procedure in the manner in which we now find it in the Code of 1942.

Section 338 provides that the lien of sawmill employees or laborers shall take effect as to purchases or encumbrances for a valuable considera-

---

[42]203 Miss. 142, 33 So.2d 302 (1947).

[43]*Cf.* MISS. CODE § 849 (1942), which provides that trust property of a cestui que trust shall be subject to debts of the cestui que trust as if owned by him, and may be sold under execution at law, ". . . and, before a sale under a mortgage or deed of trust, the mortgagor or grantor shall be deemed the owner of the legal title of the property conveyed in such mortgage or deed of trust, except as against the mortgagee and his assigns, or the trustee after breach of the condition of such mortgage or deed of trust."

[44]MISS. CODE § 341 (1942). In the case of Runnels v. Fairchilds, 204 Miss. 287, 37 So.2d 312 (1948), the court held that replevin was not the appropriate remedy, saying that replevin was a possessory action and the statutory lien for purchase money did not confer upon the seller the right to possession, but vested in him only the right to have the property seized by the officer and for a personal judgment for his demand and for the sale of the property through the processes of the court to satisfy his demand, with the right in the purchaser to any overplus from each sale.

It is interesting to note that the court in this case held that they did not decide whether our statutory lien for purchase money might be enforced in a court of equity with no other ground for equity jurisdiction being involved therein. On this point, see 33 AM. JUR., LIENS § 44.

[45]Laws of 1908, c. 131.

[46]Laws of 1922, c. 282.

tion, without notice thereof, only from the time of commencing judicial proceedings to enforce the lien, and unless such proceedings have then begun, the said lien shall expire six months after the claim is due. In the prior two sections, Sections 336 and 337, there is no provision for encumbrances for a valuable consideration, which should relieve this statute of the difficulty encountered under the purchase-money statute as to deeds of trust and the priority of the lien of the deed of trust, wherein a purchase-money lien is concerned.

Where title to property seized under a writ of seizure is in question, it is a matter for submission to the jury.[47]

An employee, as used in Section 338, has been defined so as to include a larger class than mere laborers, but not to include independent contractors.[48]

This lien has been construed as prior and preferential to a lien for purchase money in view of the last clause stating the preferential nature of such lien.[49]

The above statute applies only to laborers with whom the owner of lumber and timber directly contracts, and does not afford a lien to the employees of a person contracting with such owner.[50]

The writer is unable to locate the session laws wherein the lien on water-craft was established, as presently defined by Section 340, Code of 1942.

The first definition of such a lien is found in the Code of 1880,[51]

---

[47]Broadus v. Calhoun, 139 Miss. 28, 103 So. 808 (1925).

[48]Hinton & Walker v. Pearson, 142 Miss. 50, 107 So. 275 (1925). Appellants, who sought to enforce such a lien, had trucks and drivers to haul appellee's lumber under an agreement that they were to be paid three dollars per thousand feet for hauling. Appellants themselves did not drive the trucks, nor load or unload the lumber from the trucks. They merely furnished the trucks and employed the drivers to drive them, load and unload the lumber. As the lumber was delivered in the trucks by their drivers, one of the appellants was present to check the lumber in order to keep track of the amount hauled and delivered. The court held that the appellants were entitled to the lien under the statute. *Cf.* Weeks v. Seals, 143 Miss. 222, 108 So. 505 (1926), where the court held that a person furnishing teams of horses to another, where the owner of the logs did the loading, driving and unloading, has no lien under the statute now denominated Section 338. The distinction set forth was that in the second case neither labor nor laborers were furnished; in the former laborers were provided.

[49]O'Quinn v. Grace, 143 Miss. 655, 109 So. 672 (1926).

[50]Held v. Surber, 158 Miss. 799, 131 So. 420 (1930). There is some question in the writer's mind whether this decision can be reconciled with Hinton & Walker v. Pearson, *supra* note 48. It will be noted in the *Hinton* case that the claim of Hinton was based on labor performed by Hinton's employees who had not contracted directly with Pearson for the labor performed. But on close examination, we find that the statute at that time does not coincide with the present one, MISS. CODE § 338 (1942). The writer finds no decision under the statute as it is now written, but the writer is inclined to believe that the decision of *Held v. Surber* will be distinguished or overruled.

[51]Sections 1395-1396.

which creates the lien, but does not provide the manner of enforcement by way of summons and seizure. The Code of 1892[52] provided for the manner of enforcement in the same manner as the lien for purchase money is enforced. Since that time there has been little change in the law. In 1946 the legislature added the lien of municipal dockage, etc., as Section 340.01 of the Code of 1942.

The present statute, Section 340, provides for a lien on water-craft for work done or materials supplied, and for wages of persons employed on board such a water-craft for work done or services rendered, in preference to all other debts.

Such lien does not abrogate the common law right under which every man who has lawful possession of a chattel upon which he has expended his money, labor or skill, may retain it as security for his debt. The purpose of the statute is to enlarge the common law right and give a better remedy, and this remedy is not exclusive.[53]

The statute gives a lien for work done or materials supplied by any person, but this does not include employees of one who contracts with the owner to make certain repairs. An independent contractor for repairs has no power to create and fasten a lien upon any vessel in the process of making the repairs thereon, unless he has connection with the vessel for navigation or is agent of the owner for those particular purposes.[54]

Chapter 65 of the Laws of 1877 provided a lien in favor of the owner of all stallions, jacks and bulls upon the colts and calves sired by such stallions, jacks and bulls and to the extent of the value of the price agreed on for the services of said animals between the owners of the colts and the calves so sired.

Section 2 of the act provided that such lien should be enforced by suit before any magistrate having jurisdiction of the debt, the writ, judgment and execution describing the colt or calf on which the lien was claimed, and when judgment rendered, the colt or calf declared liable to be sold to pay the debt and costs, and when so declared, levied on and sold as properties usually levied on and sold under execution at law.

Yet, the Code of 1880[55] provided that the enforcement was to be in the manner provided for in enforcing the lien of employers and employees, and subject to all the provisions of the act on that subject.

---

[52]Section 2726.
[53]Kornosky v. Hoyle, 97 Miss. 562, 52 So. 481 (1910).
[54]Valverde v. Spottswood, 77 Miss. 912, 28 So. 720 (1900). This same principle was announced under the sawmill employees statute, Section 338, in the case of Held v. Surber, *supra* note 50.
[55] Section 1394.

Chapter 57 of the Laws of 1888 added the proviso as to misrepresentation.

In the Code of 1892[56] it was provided that the lien might be enforced in the manner provided for the enforcement of stable-keepers[57] The lien of stable-keepers provided only for the obtaining of a judgment and a special order and execution for the sale of the property upon which the lien existed for the payment of such judgment and costs.

However, Chapter 44, Code of 1930, amended this procedure to conform to the present manner of enforcement of a lien by writ of seizure.

Procedure

The manner for enforcing the liens which have been discussed is set forth in Section 341, Mississippi Code of 1942. It provides that the person having the lien go before any officer authorized to administer oaths in any county where the subject matter may be and make an affidavit. The affidavit shall describe the subject matter of the lien, set forth the claimant's interest therein, and assert his lien thereon, with an itemized account of his demand. He shall name those persons interested in his claim or who shall have other claims or interests in the property. Thereupon the clerk or justice issues a writ directed to the proper officer and returnable to the proper court, commanding the officer to seize so much of the property as shall be necessary to satisfy the plaintiff's demand and costs. The officer summons the persons named in the affidavit as interested therein, to appear in the designated court at the fixed time to answer the complaint.

The form of affidavit is set forth in Section 343, Code of 1942, and the form of the writ in Section 345. Both of these can be varied so as to conform to the facts of jurisdiction.

The jurisdictional amounts are set out in Section 346.

The remaining portion of the procedure is set out in Sections 347-351, which may be summarized by saying that the procedure conforms to the usual procedure in circuit courts as to the return day of the writ and the cause being triable. Under Section 350, we have a procedure whereby a claimant may intervene, and the judgment thereafter be framed to adjust the rights between all of the several parties as to the subject matter. This section also provides that the costs may be apportioned as the court may consider just, which is an unusual provision for a court at law.

---

[56]Sections 3076-3078.
[57]Miss. Code c. 84 (1906).

Section 341 provides, "A person having any lien in the foregoing sections mentioned can enforce the same. . . ." Our Court has interpreted the same language in an earlier statute creating this lien of laborers to include an assignee of said laborer, who in turn might enforce said lien just as the laborer could.[58]

The statute further provides that the enforcement can be made by

> ". . . making affidavit before any officer authorized to administer oaths of any county where the subject matter of the lien may be. . . ."

The affidavit may be amended at any time in open court prior to the dismissal of a judgment.[59]

Our Court in *Parker v. McCaskey Register Co.*[60] did not take the statute literally, but construed it in connection with Section 745 of the code, which provides in substance that any officer of any other state or the United States authorized by law thereof to administer oaths might administer the oath required by this affidavit.

The affidavit on which the writ of seizure was issued may be amended at the return term and prior to the entrance of a judgment by the court by adding parties and even enlarging as to the subject matter involved.[61]

Where the affidavit filed contains full information as to the claim and nature thereof for the property sought to be subjected, our Court has held that there is no necessity for filing an independent itemized account; particularly is this so where the claim is upon a contract of employment by the month at a fixed and definite sum, and not upon open account.[62]

In *Bryant v. J. C. Harris Lumber Co.*,[63] plaintiff sought a writ of seizure before a justice of the peace, made the requisite affidavit, described the property, stated the amount of the indebtedness and the writ of seizure

---

[58]Kerr v. Moore, 54 Miss. 286 (1876). A laborer transferred to two assignees such interest as he had by statute in the crops of his employer, the defendant. The assignees instituted a proceeding in circuit court by writ of seizure against defendant's crops. The defendant argued that the statutory lien was not transferrable or assignable. The Mississippi Supreme Court properly likened the lien given at law to the laborer for his wages to that of a mechanic or materialman for what is due him, and after recognizing that there was at that time a conflict as to the assignability of a mechanic's lien, held that the weight of authority was in favor of the assignability of a mechanic's lien. Therefore, they held the lien of the laborer for wages was assignable. By analogy with this case, it has been held that a landlord may assign his lien on the crops of his tenant. Taylor v. Nelson, 54 Miss. 525 (1877).

[59]May v. Williams, 61 Miss. 125 (1883); Hartsell v. Myers, 57 Miss. 135 (1879).

[60]177 Miss. 347, 171 So. 337 (1936).

[61]May v. Williams, *supra* note 59 (where amendment was permitted to show jurisdictional amount and to join new parties).

[62]Baldwin v. Morgan, 73 Miss. 276, 18 So. 919 (1895).

[63]70 Miss. 683, 12 So. 585 (1893).

was issued on the same day. An itemized account of the indebtedness, however, was not filed until two days afterwards. On the trial before the justice of the peace, a motion was made by defendant to dismiss the suit because the itemized account was not filed on the day of the issuance of the writ. This motion was overruled, and judgment rendered for the plaintiff, from which there was an appeal. The state Supreme Court said there that it would have been erroneous to dismiss the suit because the itemized account was not filed until two days after the writ was issued.[64]

Section 342 provides that if any party in interest be a non-resident of the state, or his whereabouts unknown, he may be made a party to the suit and proceeded against as in case of suit by attachment against such persons.

Sections 343, 344 and 345 are self-explanatory and need no further construction or interpretation.

Under Section 346, which sets out the jurisdictional amount, the jurisdiction of the court is determined by the amount demanded and not by the value of the property seized.[65]

Section 347, Code of 1942. provides that the writ may be made returnable at any time before a justice of the peace, which will give the parties in interest five days notice; whereas, in circuit court it may be executed at any time before the first day of the term, and the cause shall be triable at such term.[66]

If a writ be made returnable to the wrong court, it shall not be dismissed but transferred to the proper court, and the cause proceeded with as if the writ had been made properly returnable.[67]

Any property seized by virtue of this writ of seizure may be replevied as provided in the action for replevin.[68]

---

[64]Miss. Code § 1255 (1880), the statute under which that case was decided, is different from our present statute. Relying on Baldwin v. Morgan, *supra* note 62, it would appear that the filing of the affidavit is sufficient, and if the affidavit is sufficiently informative, there is no necessity for the filing of an independent itemized account.

[65]Parker v. McCaskey Register Co., *supra* note 60; May v. Williams, *supra* note 59.

[66]*Quare:* Does this conflict with Miss. Code § 1519 (1942), which provides: ". . . but such issue of fact may not be tried before the next succeeding term without consent of parties, except in actions in which the defendant has been personally served with process for thirty days before the return-day, actions to enforce mechanics' liens, actions commenced by attachment, and actions of replevin, in which such issues shall be tried at the return term. . ."? More than likely these two statutes will be construed *in pari materia,* and also cognizance taken by the court in actions to enforce methanics' liens for the manner of enforcement, the same as is allowed in cases of liens for purchase money of goods, thereby making Section 347 a literal statement of when the writ is returnable and triable.

[67]Miss. Code § 348 (1942).

[68]*Id.* § 349.

Any person interested in the property seized may contest the seizure on the return day of the writ, or on any day before the rendition of final judgment, by filing a statement in writing under oath of his defense or claim, itemizing his account, if any he has, and then the case shall be at issue between all the parties and tried as other cases in circuit court.[69]

Section 351 provides that the death of a party does not abate a suit under writ of seizure, but that it is proceeded with as in other personal actions; and if any party die after judgment, the same is enforced as judgments in other personal actions.[70]

Where defendant in his answer itemizes his account of his defense, it is not encumbent upon him to file an itemized account of payments made.[71]

In *Hill v. Judd*,[72] appellant obtained a writ of seizure upon the crop of appellee for balance alleged to be due him as plantation manager. The declaration alleged the contract of employment to have been made on January 1, whereas proof showed the contract was made in October, 1920, to begin January 1, 1921. The Mississippi Supreme Court said that there was no question that Hill was employed as manager of this plantation, and that there was no variance between the allegation and the proof sufficient to necessitate an amendment in the pleading.

A plaintiff filed suit to enforce his agricultural laborer's lien against his employer by seizing twenty-five tons of cottonseed. Bond was given by the employer for the seed. The testimony showed that he was indebted to plaintiff in the sum of $360 by contract for his labor, for which amount the jury gave a verdict for the plaintiff against the employer and his bondsmen, under a replevin bond given by the employer for the seed. There was no testimony introduced at the trial showing the levy or value of the seed, or that the seed was liable for the employee's lien. The court held that under this section the laborer had a remedy both *in rem* against the seed and *in personam* against the defendant. Further, such remedy is to be pursued like those of replevin, with the laborer having the right to recover a personal judgment, as well as a judgment against the property seized. Thus, in this respect, it goes further than a judgment in replevin. The personal judgment against the employer was affirmed, but the judgment against the bondsmen was reversed and dismissed on appeal.[73]

Section 355, Code of 1942, provides that if lien-holders mentioned in

---

[69]*Id.* § 350.
[70]*Id.* §§ 1459-1462.
[71]Easterling v. Shaifer, 38 So. 230 (Miss. 1905).
[72]Hill v. Judd, 96 So. 849 (Miss. 1923).
[73]McCoy v. Toler, 128 Miss. 202, 90 So. 628 (1921).

the two foregoing sections part with possession of the property, they shall retain their liens to the extent that is allowed in cases of liens for purchase money of goods, and may enforce the same in the manner provided for the enforcement of such type of lien.[74]

Since the procedure of enforcement has been discussed heretofore, there is only one phase that need be discussed in the enforcement of mechanics' liens and stable-keepers' liens, and that is the priority of such liens where possession has been surrendered.

A mechanic's lien on a motor truck for repairs necessary for the operation thereof and to prevent its deterioration, is superior to a seller's lien under a conditional sales contract, and the knowledge of the mechanic of the prior conditional sales lien does not defeat the priority of his lien.[75]

The priority of a mechanic's lien as to items of indebtedness incurred prior to the execution of a deed of trust depends upon whether or not the beneficiary in the deed of trust had actual notice or knowledge of the prior mechanic's lien.[76]

In *Watson v. Broadhead*[77] the appellant made certain repairs on a truck upon which there existed a prior deed of trust. The repairs on this truck were made at intervals between, and including, March 3 and August 21, 1945, and upon completion of the repairs each time, the truck was delivered to and taken away by the owner without payment of the mechanic's charges. The deed of trust was not foreclosed, but in January, 1946, a settlement was made between the appellee, who was an assignee of the deed of trust, and the owner under which all of the property covered by the deed of trust, except the truck here in question, was delivered to the appellee. The owner delivered to the appellant the truck to be held by him as security for his repair bills, and further testified that he advised the appellee the day before the settlement that he owed a garage bill on the truck.

The Mississippi Supreme Court, speaking through Chief Justice Sidney Smith, said that the mechanic did not lose his lien, except as against one deriving title or possession through the owner of the truck and cited Section 337, Code of 1942. Then the Court stated:

> "The appellee was not in possession of the truck, and title thereto did not vest in him under the deed of trust executed to the Dixie Planing Mill and assigned to him, for it was not fore-

---

[74]Section 353 applies to mechanics' liens and Section 354 to stable-keepers' liens.
[75]Devan Motor Co. v. Bailey, 177 Miss. 441, 171 So. 342 (1936). Billups v. Becker's Welding Co., *supra* note 36.
[76]Billups v. Becker's Welding Co., *supra* note 36.
[77]See note 42 *supra*.

closed and no breach of the condition thereof appears from the evidence. Section 849, Code 1942, Buck v. Payne, 52 Miss. 271. This deed of trust therefore gave him no priority over the appellant's mechanic's lien."

Conclusion

The writ of seizure, properly utilized by the practicing attorney, accomplishes most successfully the object and wishes of a client. The only vital problem found is that of priority of the lien sought to be enforced.

SEQUESTRATION

*Nelson Cauthen**

The writ of sequestration was in use in the equity courts of England from an early date and came to us as a part of the chancery system borrowed by us from that country. This writ was first used to punish persons who were in contempt of a decree of the equity court by taking possession of their property until they cleared themselves of the contempt. The writ was also used to enforce equity decrees generally, because at an early date equity decrees were only against the person of the defendant and could not be enforced by execution as could law decrees. Therefore, the equity court began to compel submission to its decrees by taking possession of the defendant's property by virtue of a writ of sequestration.[1] These two uses for the writ have fallen into disuse. Statutes now allow the enforcement of equity decrees by execution as law decrees are enforced.[2]

The use of the writ of sequestration as a writ to preserve property pending the outcome of litigation was a later development of this writ in the chancery system of England. This usage was passed on to us from England and is present in our law today. Sections 1328 to 1334 inclusive, Mississippi Code of 1942, deal with the writ of sequestration. However, this writ exists in Mississippi law as an inherent power of the chancery court.[3]

Section 1328 of the 1942 Mississippi Code says:

> "When a bill is filed in the chancery court in reference to personal property, and affidavit and bond as required therefor is made and filed, the clerk of the court shall issue a writ of sequestration."

The phrase "in reference to personal property" means that there must be some interest in the personal property itself or there must be some lien against said personal property. There are two exceptions to this general rule and these exceptions are created by statute. Section 2732 of said code allows writs of sequestration to issue in cases of attachment in chancery; and Section 1327 allows writs of sequestration to issue in suits by creditors to set aside fraudulent conveyances. With these two exceptions, there must exist some right in the personal property or some lien thereon before such a writ can be issued.

In the case of *Dean v. Boyd*[4] the beneficiary in a deed of trust brought suit in chancery against the grantor of the deed of trust and the grantor's wife for the debt secured by the deed of trust and, after filing the affidavit

---

* Attorney at Law, Canton, Miss.

1 57 C.J., Sequestration § 4.

2 Miss. Code § 1374 (1942); Griffith, Miss. Chancery Practice (2d ed. 1950).

3 Lee v. Lee, 135 Miss. 865, 101 So. 345 (1924); Dean v. Boyd, 86 Miss. 204, 38 So. 297 (1905).

4 86 Miss. 204, 38 So. 297 (1905).

and bond required, asked that a writ of sequestration issue for the cotton covered by the deed of trust, which cotton was grown on the wife's property by her husband as her statutory agent. Our Supreme Court held that this was a proper use of the ancient writ of sequestration, because the complainant had a lien by virtue of the deed of trust against the cotton itself. In a chancery suit, *McGee v. Weeks*,[5] the landlord sought to recover rents for land claimed by him, and a writ of sequestration was issued by the chancery court to hold the cotton grown on the land in question pending the outcome of the suit. This was held to be a proper use of the writ as the complainant had a landlord's lien upon the cotton itself to secure the rent.

Section 495 of *Griffith's Chancery Practice*[6] states that, with the two exceptions previously mentioned, a writ of sequestration will not issue unless the complainant has an interest in the personal property or a lien upon it. The case of *Lee v. Lee*[7] might cast some doubt upon this rule. However, it was decided by a divided court and the dissenting opinion is very strong. In that case the complainant had secured a divorce in the state of Tennessee by publication. Her husband was insolvent but owned an undivided one-seventh interest in real property in the state of Mississippi, which property was being sold in a partition proceeding. Suit was filed by the complainant in chancery court in this state to recover money which she had spent in caring for their child. A writ of sequestration was issued to the commissioner in the partition proceeding on affidavit and bond filed by the complainant asking that the money representing her husband's interest be impounded. The defendant demurred to the bill and made a motion to quash the writ. Our Supreme Court by a divided opinion held that the bill stated a cause of action as the wife was entitled to be reimbursed for the money spent by her since it was the defendant's duty to support their child. The Court overruled the demurrer. The appellant had contended that the action was legal, and not equitable, and therefore it was not proper to issue the writ of sequestration. The dissenting opinion agreed with the appellant and pointed out that there was no property right in the fund, nor was there any lien thereon held by the complainant. It would seem to the writer that the dissenting opinion is the better rule of law, and in line with the other cases.[8]

The writ of sequestration is an auxiliary writ and is only issued in support of a suit which has already been filed in the chancery court. In

[5] 112 Miss. 483, 73 So. 287 (1916).
[6] GRIFFITH, MISS. CHANCERY PRACTICE (2d ed. 1950).
[7] 135 Miss. 865, 101 So. 345 (1924).
[8] Judge Griffith states in MISS. CHANCERY PRACTICE § 495 (2d ed. 1950) the general rule, and in footnote 16a: "But see *Lee v. Lee*, . . . a case peculiar on its facts and which was affirmed by an evenly divided court." That learned writer seemed to feel that the case was out of line with the general rule of law.

the case of *Yazoo Delta Mortgage Co. v. Hutson*[9] a writ of sequestration was issued before the bill was filed. The Mississippi Supreme Court held that this was irregular, as a writ of sequestration could not be issued prior to the filing of the bill.

An affidavit is required before this writ can be issued. Section 1329, Code of 1942, says:

> "Before any writ of sequestration shall issue, the complainant shall make and file an affidavit showing that he has good cause to believe, and does believe, that there is danger of the removal of the property involved in the suit beyond the limits of the state, or of its concealment in the state so as to be beyond the process of the court, or of its transfer so as to defeat the rights of the complainant, and that such removal, concealment, or transfer is about to occur, and, moreover, shall give the bond required by the next section."

The affidavit must contain the allegations required by the statute. The affidavit in the case of *Universal Credit Co. v. Linn Motor Co.*[10] did not contain the allegation that there was danger of removal of the property from the state, or of its concealment. It was held that the affidavit was insufficient to justify the issuance of a writ of sequestration.

Section 1330, Mississippi Code of 1942, requires that before the writ shall be issued the complainant shall make bond in double the value of the property to pay all damages which may accrue from the wrongful seizure of the property to be sequestered, which bond shall be filed in the cause. Our court is very liberal in allowing amendment of sequestration bonds. In the case of *Dean v. Boyd*[11] the complainant was properly allowed by the chancellor to amend his bond by getting another surety to sign the bond. Where an altogether improper bond has been filed the party will be permitted to substitute in its place a proper sequestration bond.[12] Our Court held in the case of *Stauffer v. Garrison*[13] that complainant's bond is for the wrongful seizure of property and does not cover attorney's fees and other expenses incident to the cause. The court said, "The suit is one thing, and the seizure of the property under process in it is another, and the bond of the complainant is security only for the wrongful seizure of the property." Attorney's fees could not be recovered as they were incurred in the suit anyway.

Sequestration writs are usually issued by the chancery clerk of the court where the case is filed, but they may be ordered and the bond prescribed by any supreme court justice, circuit judge or chancellor.[14]

---

[9] 140 Miss. 461, 106 So. 5 (1925).
[10] 195 Miss. 565, 15 So.2d 694 (1943).
[11] See note 4 *supra*.
[12] Harleston v. W. Louisiana Bank, 126 Miss. 593, 89 So. 257 (1921).
[13] 61 Miss. 67 (1883).
[14] Miss. Code §§ 1331, 1657 (1942).

When the sheriff or other proper officer has taken possession of the property under the writ, the defendant from whom the property was taken has the right within five days to recover same on making bond in double the value of the property as determined by the officer or in double the value of the indebtedness claimed, if the value of the property greatly exceeds the value of the debt. Said bond is conditioned to have the property forthcoming to abide the decree to be rendered. If the property is not so forthcoming the bond shall have the force of a judgment and execution may issue thereon.[15]

In the case of *Bonner v. Meeks*[16] the defendant whose property was seized under a writ of sequestration gave bond and retained the property. The defendant lost the suit, and the lower court rendered a decree in favor of the complainant against the sureties, awarding damages for the wrongful detention of the crops. The Supreme Court held that no provision was made by our statute for the bond to cover damages for the wrongful detention of the property and, as there is no provision in the statute for such a judgment, none could be rendered. Our Court has also ruled that if the defendant whose property is seized under a sequestration writ enters into bond and retains possession of the property, and said property is lost or destroyed through no fault of his, then his bondsmen will not be held liable for the loss of the property.[17]

If the defendant fails to give bond within five days from the seizure under the writ then the complainant may give such bond and receive the property. If the property is liable to waste or decay or subject to extraordinary expense in preserving it, and if neither party makes bond within ten days from the seizure, the officer having possession shall sell it as sales are made under a writ of fieri facias. If the property is not liable to waste or decay, or expensive to keep, the officer must keep possession of it unless the court orders that it be sold. If the property is sold the proceeds are held under the control of the court.[18] If the court does not order a sale and if the Sheriff sells the property which is not subject to waste, decay or expensive to keep then the rights of the party are not prejudiced and the remedy is against the Sheriff himself.

If a writ of sequestration is illegally used to take possession of a party's property, he should file a motion in the cause to quash the writ and dismiss the sequestration. This is in accordance with the practices in our courts.[19]

---

[15] MISS. CODE § 1332 (1942).
[16] 106 Miss. 870, 64 So. 833 (1914).
[17] Gaddis v. Clegg, 118 Miss. 607, 79 So. 811 (1918).
[18] MISS. CODE § 1334 (1942).
[19] See notes 9, 7, and 4 *supra*.

State Bar Section

REVISED RULES OF THE SUPREME COURT OF MISSISSIPPI*

Order that the following rules be adopted for the government of this Court, superseding all others heretofore in force and not hereby re-adopted.

Rule 1. Transcript—How Prepared

(1) Every transcript of record brought to this Court shall be distinctly and plainly printed, or typewritten; and, if typewritten, on paper not less than eight, nor more than eight and one-half inches wide and fourteen inches long, on one side of every leaf; and each page shall be numbered at the bottom, at or near the center, and there shall be a blank margin at both top and bottom of not less than one inch, a blank margin at the right side of not less than one-half inch, and a blank margin at the left of not less one and one-half inches. Transcripts may be typewritten on linen paper, to weigh not less than eight pounds to one thousand sheets, and must be double spaced. Only black record typewriter ribbons shall be used in making up transcripts and these must not be worn or dim. Pica type or larger should be used.

(2) No carbon or other duplicates, nor transcripts typewritten with copying ink will be received. Each record shall be prefaced by a suitable index, and each typewritten transcript shall be securely bound in non-flexible pasteboard covers, with marbled sides. In volumes of about an equal number of pages, not to exceed in any case two hundred and fifty pages in a volume, for the payment of which binding appellant will be allowed sixty cents per volume to be taxed with the costs. The appellant may cause the transcript to be bound as above described, or he may, at the time of taking his appeal deposit with the clerk of the court from which the appeal is taken, a binding fee of seventy-five cents per volume of two hundred and fifty pages. Counsel shall not put any markings on the original record.

(3) In such cases the clerk shall transmit the unbound transcript, with the binding fee, to the Clerk of this Court. Transcripts shall not be folded, but may be rolled for transmission, if not bound as required; and if not bound, the sheets shall not be fastened together.

(4) The Clerk of this Court shall not accept any record made up in violation of these rules, and for the making and filing of such a record no clerk shall be allowed any fees whatever.

(5) The Clerk of this Court shall refuse to receive a record wherein the court reporter's transcript is not indexed as required by Section 721, Code 1930 (Section 1636, Code 1942). When a transcript not so indexed is tendered, the Clerk shall return the same to the clerk of the court below; and at the same time the Clerk of this Court will notify the attorneys for the appellant, by letter or letters, of his action and the reason therefor.

Rule 2. Transcript—What to Contain

A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from, unless the appellant shall, by writing, request other matters specified to be embraced in the transcript, a copy of which shall be annexed to the transcript; and

---

*The Mississippi Law Journal, presents for the convenience of the Mississippi Bar these revised rules as adopted by the Court, December 1, 1952.

exhibits to declarations, bills, answers, depositions, etc., shall immediately follow the particular plea or deposition, first referring to them, and shall be copied but once. The several answers of witnesses as made in depositions shall each follow consecutively the particular interrogatory to which they are responsive; and no commission to examine a witness, nor certificate of a commissioner to a deposition, nor any proceedings to obtain such a commission, shall be inserted in any transcript except where a question as to the sufficiency or legality thereof appears from the record to have been decided; and no fee shall be allowed for anything besides these matters required to be embraced in the transcript.

Rule 3. Agreed Transcript

By agreement of parties or their attorneys, made in writing, and attested by the Clerk of the Court in which any case may be pending or record existing (which agreement shall be filed and made a part of the transcript of such record), such parts of the record and proceedings as shall be agreed shall constitute the transcript of the record to be brought to this Court; and shall be certified as such and be considered a full transcript in this Court for the consideration and final adjudication of the cause here.

Rule 4. Suggestion of Diminution of Record

If a record be imperfect, diminution may be suggested by either party, and a writ of certiorari will be awarded, provided that if the filing of such a suggestion has been unnecessarily delayed to the prejudice of the opposite party, the writ will be awarded only upon such terms as the Court may impose, or it may be refused altogether.

Rule 5. Record and Papers—How Filed

No record or other paper shall be considered as filed until so marked by the Clerk—process of this Court excepted—and the Clerk shall indorse the date of filing.

Rule 6. Assignments of Error

(1) At least thirty days before the date when a case is set for hearing the appellant shall file an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel.

(2) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

(3) The right of an appellant to obtain a review in this Court of any ruling made in the trial court shall not depend in anywise upon his having filed in such court a motion for a new trial, or if such motion has been filed upon the grounds thereof being distinctly specified.

Rule 7. Briefs

(1) Appellant's brief shall be filed not later than thirty days before the date the case is set for hearing; appellee's brief shall be filed not less than ten days before the date the case is set for hearing, and any rejoinder brief shall be filed not later than three days before the date the case is set for hearing. This rule shall not apply where counsel have entered into a written agreement, filed with the Clerk, relative to the filing of briefs, but no brief shall be filed after the case has been submitted, except by leave of the Court first obtained.

(2) The contents of briefs are for the determination of counsel, but those briefs are of most assistance to the Court, in which there precedes the argument of counsel: first, a concise statement of the case so far as essential to an understanding of the questions presented for determination with specific references to the precise places in the record where the points discussd may be found; and second, a "brief of the argument," which shall consist of the points or propositions of law, or fact, to be discussed with the citation of authorities relied upon in their support.

(3) Briefs shall be typewritten or printed; and if typewritten shall be in black, non-copying ink, double spaced, on white paper, without the name of any person or advertising matter thereon. There shall be appended thereto a certificate that a copy of it has been delivered or mailed to opposing counsel; and if mailed, the certificate to appellant's original brief must contain the further statement that it was done not later than two days before the filing thereof.

(4) Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and this Court will take such further action relative thereto as it may deem proper.

Rule 8. Return Days

Except as may be otherwise provided by law, the First day of each term and the First Monday of January, May and July shall be the return days for all appeals and all process in civil cases.

Rule 9. Call and Order of Docket

(1) Except as may be provided by special order, all civil cases will be called for argument and submission in the order in which they stand on the docket.

(2) At least forty-five days before the First Monday of each month, the Clerk shall mail to each lawyer or firm of lawyers interested therein a list of cases to be called during that month; but the failure of an attorney to receive this list shall not entitle him to have a case in which he is of counsel passed or reinstated after submission or dismissal.

(3) On the assembling of the Court on each Monday, the entire number of cases set for the week will be called, with a view to the disposition of such of them as are not to be argued.

Rule 10. Argument of Counsel

Only two counsel will be heard for each party on the argument of a case. The time allowed therefor will be determined by the Court in each case, and may be apportioned between the counsel on the same side in their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.

Rule 11. No Reversal for Harmless Error

No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

Rule 12. New Trial as to Part

In case a judgment is reversed, and a new trial granted, it shall be only a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.

Rule 13. New Trial as to Damages Only

When a judgment is reversed and a new trial ordered because the damages are excessive or inadequate, and for no other reason, such judgment shall be set aside only in respect of damages and shall stand good in all other respects.

Rule 14. Suggestion of Error

(1) The losing party may within fifteen days after an opinion is handed down file a written suggestion of error of law or fact therein. Upon good cause shown this time may be extended to thirty days; but an application for such an extension must be filed within the original fifteen days.

(2) An adjournment of Court less than fifteen days after the rendition of a judgment shall not preclude the filing of a suggestion of error therein, but the same may be filed with the Clerk within the time prescribed for presenting such suggestion of error to the Court, whereupon all proceedings on the judgment shall be stayed until it shall be acted upon at the next session of the Court, unless a majority of the judges of the Court shall certify in writing to the Clerk prior to the next term that they have considered the suggestion of error and have determined to overrule it; upon receipt of such certificate such proceedings shall be had as if a suggestion of error had not been filed.

(3) No reply to a suggestion of error shall be filed, unless the Court, by special rule, otherwise, shall call therefor. But no suggestion of error will be sustained to the prejudice of the adverse party until he has been given an opportunity of replying thereto. After a suggestion of error has been sustained, or overruled, by the Court, no further suggestion of error shall be filed by any party.

(4) Any suggestion of error containing language showing disrespect or contempt for this Court will be stricken from the files, and the Court will take such further action relative thereto as it may deem proper.

Rule 15. Papers Out of Office

The person through whose fault a record is not in the courtroom when the case is called for submission shall be fined the sum of twenty-five dollars.

Rule 16. Motions

(1) Every Saturday shall be motion day; and if counsel be not present, and have no briefs filed when their motions are regularly called, such motions shall be dismissed; and no motion once disposed of, or dismissed, shall again be heard. No motion will be considered, until the opposite party shall have had at least three full days' notice, by mailing, or delivery to such party, a copy of same.

(2) Any party desiring oral argument on a motion shall give at least two days advance notice to the Clerk and to opposing counsel.

Rule 17. Motion to Dismiss—When Waived

When a motion is made to dismiss, and counsel for the motion either withdraws it or suffers it to be dismissed for want of prosecution, it shall be considered a waiver of the defect on which the motion was based, unless it be so material that no judgment can be given.

Rule 18. Dismissed Cause—How Reinstated

No cause that has been dismissed shall be reinstated without an affidavit setting forth probable error in the proceedings.

Rule 19. Motion to Retax Costs—Statutory Penalty

All motions to retax costs or for the awarding or disallowance of 5% damages on appeal or to correct any judgment shall be filed within sixty days from the entry of the final judgment in the case. Provided, however, that when such allowance or disallowance of costs or other matter affecting the judgment has been incorporated in the opinion, the rule applicable to the filing of suggestions of error shall apply.

Rule 20. Docket—How Called—Delay Cases

At each term of the Court the docket shall be taken up in its order. But on regular motion-day, by motion entered for that purpose, causes may be submitted on a suggestion that they are brought here for delay, and if satisfied of the truth of such suggestion, the Court will take up such causes first, and make proper disposition of them.

Rule 21. Failure to Prosecute—Cause Dismissed

When any case shall be called for trial in its order, if no counsel appear and no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution.

Rule 22. Calculations

(1) When a party relies on an excess in the calculation of interest or damages as a reason for reversing a judgment, a true calculation shall be presented to the Court, in writing and figures, with a certificate by some counsellor not interested in the cause, that the calculation is correct; and no such error will be noticed unless so presented to the Court.

(2) When a complaint is made, in a motion to retax the costs incurred in this Court, that a fee allowed based on the number of words of an instrument, or transcript thereof, or the transcript of the record as an entirety, is incorrect, the motion shall be accompanied by a written statement of the true number of such words, with a certificate of its correctness by a competent disinterested person; without which no such complaint will be considered.

Rule 23. Agreement of Counsel

No agreement between counsel will be regarded unless reduced to writings and signed and filed by them.

Rule 24. Authority of Counsel—When Required

On motion supported by affidavits, any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting any appeal in this Court; and on failing to produce such authority, or furnish such evidence, the appeal may be dismissed.

Rule 25. Criminal Docket—When Called

Criminal cases may be set by the Chief Justice for call on any Monday when the Court is sitting, and in such numbers as he may designate.

Rule 26. When Appellee May Not Waive Time

After a case has been called on the docket, the appellee shall not be permitted to waive the time within which citation is required to be served, nor to enter his appearance for trial of the cause at that term.

Rule 27. Attorneys Must Be Admitted to Practice

Attorneys at law who have not been admitted to practice in this Court shall not be permitted to argue orally, or file briefs or any paper in any cause in this Court.

Rule 28. Papers Not Filed After Submission

The Clerk shall not file with the papers of any cause any paper after the cause has been argued, or submitted, except by leave of the Court.

Rule 29. Original Papers—When Considered

Whenever it shall, in the opinion of the Judge or Chancellor, be necessary or proper that original papers of any kind should be inspected in the Supreme Court, such Judge or Chancellor may make such rule or order for safekeeping, transporting and return of such original papers as to him may seem proper; and such papers will be considered in connection with the transcript.

Rule 30. Costs Paid by Appellant—When Mandate Retained

When costs are awarded in this Court against the appellee, and there shall have been a return of nulla bona to an execution against him, and the costs shall be paid by appellant, no mandate shall issue upon the application of the appellee, until he shall pay into the Court, for the use of appellant, the costs paid by him.

Rule 31. Penalty for Violations of the Rules of This Court

Any litigant, who by himself or his counsel, fails to comply with any of the provisions of the foregoing rules, shall, on motion of the party aggrieved, be taxed with such proportion of the appeal costs as in the judgment of the Court may seem just and proper, in addition to any other penalty which may be provided by the rules.

Rule 32. Remedial Writs

No application for supersedeas, or any other writ or remedial process mentioned in Section 1657, Code of 1942, except in cases of greatest emergency, shall ever be acted on, in any case pending in any court, by any member of the Supreme Court, ex parte; but every such application, except in cases of greatest emergency, shall be accompained by a certificate of written notice served on the opposite party, or his counsel, or some of them, at least three days before the hearing; and all such applications will be acted upon only when both sides are represented at the hearing, or after such three days notice, duly certified as above.

Rule 33. Rules May Be Suspended

These rules shall be considered as general rules for the government of the Court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the Court in any case where it shall be manifest to the Court that a strict adherence to them will work surprise or injustice.

Rule 34. Felony Cases Where Appellant is on Bail

After the submission of a felony case in which appellant is on bail, the Court will, by special order, fix the day for the rendition of its judgment. On the day so fixed, appellant must appear before the court to receive judgment, unless he shall have surrendered himself to the Sheriff of the County in which the court rendering the judgment appealed from was held.

RULE 35

(1) The Court sittings for the hearing of arguments will be held on the First, Second, Third and Fourth Mondays of each month, beginning with the Second Monday in September and ending with the Second Monday in June, and will also be held on such other days as the Chief Justice may designate, and sittings on any Monday may be dispensed with, or sittings on the Fifth Monday of the month may be had, by direction of the Chief Justice.

(2) For the convenient dispatch of business the Court will ordinarily sit in groups of five Judges. The Chief Justice shall be the Presiding Judge of one group and the Presiding Judge of the other group shall be the Judge thereof who has been for the longest time continuously a Member of the Court, and in the event no Judge of a group has been continuously a Member of the Court for a longer time than the others, the Court shall designate by an order entered upon the minutes when sitting in banc which of said Judges shall be the Presiding Justice thereof. In the absence of the Presiding Judge, the Judge of the group who has been for the longest time continuously a Member of the Court shall be the Acting Presiding Judge thereof; and in the event two Judges of a group other than the Presiding Justice thereof shall have had the same period of continuous service, the Court shall designate by order entered upon its minutes, when sitting in banc, which of said Judges shall preside in the absence of the Presiding Judge.

(3) The Chief Justice and the Presiding Justice shall ordinarily sit and preside during alternate weeks and the minutes of a group shall be signed by the Judge thereof then presiding. The other four members of the group shall be selected from the remaining Judges of the Court by the Chief Justice.

(4) The Court may sit in banc on any day of a term without previous notice thereof being given; but when a case is ordered to be argued before the Court in banc, the Clerk, at least one week before the day set for hearing, shall mail a notice thereof to each lawyer or firm of lawyers interested therein.

(5) In the event any Judge of the Court within fifteen days after a judgment has been rendered, or an order entered by any group, or while a suggestion of error therein is pending, shall certify in writing filed with the Clerk that in his opinion such order or judgment is in conflict with a prior decision of the Court, or of any group thereof, the order or judgment shall be set aside by an order entered on the minutes of the first session of either group thereafter; and the Chief Justice cause the full Court, or a quorum thereof, to assemble in a conference at a convenient time for the decision of the case, and the judgment agreed on shall be entered at any sitting of any group of the Court.

(6) In case of the absence or disability of the Chief Justice, his duties shall be performed by the Presiding Judge.

RECENT BOOKS

THE FEDERAL INCOME TAX—A GUIDE TO THE LAW (2ND ED., 1951). By Joyce Stanley and Richard Kilcullen. New York: The Tax Club Press, 1951. Pp. 374 with Pocket Supplement.

This is not a reference book. It does not purport to be, nor does it purport to contain a complete treatment of the federal income tax law. What it does—and it does it excellently—is introduce the reader to the common everyday tax problems that the general practitioner, unfamiliar with tax laws, is likely to overlook to the great detriment of his clients.

The income tax statute is extremely complex. It is frequently impossible for the uninitiated to read and grasp the meaning behind the often formidable and disheartening collection of words, phrases, references to sections and sub-sections that make up many of the statutory provisions. In most instances, the technical phrases take on meaning only after the reader has acquired a substantial background from a study of the cases that prompted any particular statutory clarification or revision. Further, while taxation is essentially a statutory subject there has developed a very considerable body of common law principles. For example, the concept of income—what is it—whose is it—has slowly evolved from a vast number of court opinions. It, like many other tax concepts, is largely of judicial origin. The busy general practitioner cannot hope to become and keep familiar with this large body of law, growing and changing as it does from day to day. Yet the impact of the income tax is felt in some way on almost every transaction in which the lawyer is called upon to advise or participate—divorce settlements, sales, leases, estate and trust administrations, employment contracts, mortgages and other security transactions, life insurance arrangements, inter-family transfers, compromise and settlement agreements; all of these, and many more, bristle with tax problems. The list could be extended to tiresome length and still be restricted to run of the mill law office practice. And with tax rates what they are the cost of overlooking the tax consequences involved in any particular transaction may be catastrophic.

Take the case of the client who purchased all the stock of a bankrupt company in 1930 for $30,000, saw it skyrocket in value to $900,000 by 1942, at which time he settled his matrimonial difficulties by transferring to his wife one-third of his stock. No one thought about an income tax problem, i.e., no one but the Commissioner of Internal Revenue. He held, and he had good authority to sustain him,[1] that the transaction resulted in a long term capital gain of $290,000 with a consequent tax of $72,500. In another case, a landlord wanted to get possession of property subject to a fifteen year lease. He offered, and the tenant accepted, $75,000 for the surrender of the lease. Neither the tenant nor his counsel thought about the possibility of that payment representing ordinary income but under the *Hort* case[2] it clearly was. To a single man with $25,000 of net taxable income this additional $75,000 received all in one year would net him only $16,120 after taxes. Other illustrations involving costly tax pitfalls in insurance arrangements,[3] debt cancellations and other apparently innocent transactions could be given.

Because such errors are likely to be extremely costly and because the vague concept of taxable income is not fully appreciated and understood by the general practitioner, this book is recommended for reading and careful study. It takes up the

---

[1]Commissioner v. Mesta, 123 F.2d 986 (3d Cir. 1941).
[2]Hort v. Commissioner, 313 U.S. 28 (1941).
[3]BOWE, LIFE INSURANCE AND ESTATE TAX PLANNING, p. 13 (1951).

income tax statute, section by section, explaining in clear understandable language the meaning and scope of those sections that are of most common application. The more technical and specialized sections are merely noted with the explanation that they are not of sufficiently wide interest to justify treatment in this small book. The great advantage of this approach is that it gives the general practitioner a good background in those sections of common application and yet retains its readibility throughout by omitting discussion of complex and technical sections of limited interest only.

The original edition of this book appeared in 1948. Since that time there have been such substantial revisions to the Code that a revised edition was clearly needed. The book is recommended to students, practicing lawyers and others who desire to get a good overall picture of income tax law. It is clear, concise and very readable—brief, yet sufficiently adequate to familiarize the reader with the general scope of the basic provisions.

*William J. Bowe**

CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION. By Arthur T. Vanderbilt. New York: Washington Square Publishing Company, 1952. Pp. 1390 with app.

This book contains a compilation of materials and cases representing a new teaching approach to modern procedure and judicial administration. For the first time, the Federal Rules of Civil and Criminal Procedure are presented together in a casebook. Manifestly, they are component parts of a single procedural system and neither is complete without the other. The author properly conceives that the Federal Rules represent the latest and most advanced system of procedures known to the common law, and that they furnish a sound standard for evaluating the procedure of the several states. Hence this casebook is not only a study of the operation of the Federal Civil and Criminal Rules, but it also furnishes the beginning for a comparative study of procedural law, if the instructor will supplement it with a comparison of these procedures with existing state procedures.

The Federal Rules are not considered in numerical order, but in the sequence in which they come into play in the trial of a lawsuit: jurisdiction, parties, venue and transfer of cases, process, remedies, pleadings, pre-trial procedures, the trial, judicial review, and enforcement of judgments. These chapters represent an outline of the book's procedural approach. At the beginning are three essays by the author. He thinks that law schools have overemphasized courses on substantive law and have neglected those on procedure. Moreover, procedure courses have assumed the burden of teaching topics which properly should be considered in substantive law courses, such as the forms of action at common law. Procedure courses have too frequently been taught with the historical method primarily in mind. This book undertakes to introduce the student to the best simplified practice of today through the rules of courts in which it is embodied and the leading cases interpreting these rules. Hence the Federal Rules are here used as the practical basis of an introductory course in practice. Another essay analyzes the place of the Federal Rules in the movement for judicial reform, and a third considers ten major questions having to do with the progress of a case.

At the convention of the American Bar Association in St. Paul in 1906, a young lawyer named Roscoe Pound delivered an address which has served and will con-

---

*Professor of Law, Vanderbilt University, Nashville, Tennessee.

tinue to serve as the rational basis for improvements in the administration of justice. It was named "The Causes of Popular Dissatisfaction With The Administration of Justice." That classic is printed in this book, and properly so, because every law student should read and study it during his first year in law school. It furnishes both him and the experienced lawyer with objective standards for judging when a judicial system is meeting its responsibilities.

Procedure cannot be understood without some knowledge of the individuals who man the courts, so Part II of this volume contains chapters on judicial selection and related problems, jury selection and service, the organized legal profession, and judicial administration. These are the four great sets of problems relating to the manpower of the courts. Materials on them have not been compiled in any other casebook to my knowledge, and certainly not in one on procedure. They give the results of the studies of the Section on Judicial Administration of the American Bar Association. Many of the maps used in *Minimum Standards of Judicial Administration,* by Judge Vanderbilt, are incorporated in these pages. They serve to mature the student's prospective on these subjects. Space does not permit an analysis of the cases used in this casebook to illustrate the various topics, but they are practically all based upon the Federal Rules and are of recent date. In an appendix are printed Maitland's *The Forms Of Action At Common Law;* excerpts from the introduction to Langdell's *A Summary of Equity Pleading;* an interesting and valuable copy of a pre-sentence report of a Federal Probation Officer to a United States District Judge, which illustrates most effectively the value of an adult probation system; and tables of the Federal Civil and Criminal Rules with parallel cross-tables, together with the casebook pages on which the same are considered.

Chief Justice Arthur T. Vanderbilt, of the New Jersey Supreme Court, was formerly Dean of the New York University Law School and a prominent New York attorney. His wide experience and knowledge make this book an extremely valuable addition to teaching materials in the field of procedure. But of equal importance is the fact that this important anthology of procedural materials will be valuable and interesting to all public-spirited members of the bar. It is an up-to-date book, compiled with the purpose of taking the mystery out of procedure, of demonstrating its significance in the most modern system of procedure in operation, of showing its essential usefulness as an aid in the investigation and ascertainment of facts in litigation, and of revealing the progress, or the lack of it, in each state in meeting the minimum standards of judicial administration recommended by the American Bar Association.

*William N. Ethridge, Jr.**

---

*Associate Justice, Mississippi Supreme Court, Jackson, Mississippi.

BOOKS RECEIVED

LAW: THE SCIENCE OF INEFFICIENCY. By William Seagle. New York: The Macmilan Co., 1952. Pp. vii, 177. $3.50.

PLEADING AND JOINDER. By William Wirt Blume and John W. Reed. New York: Prentice-Hall, Inc., 1952. Pp. xvii, 684. $8.00.

A TEXTBOOK OF LAW AND BUSINESS. By William H. Spencer and Cornelius W. Gillam. New York: McGraw-Hill Book Company, Inc., 1952. Pp. vii, 838. $7.50.

FOURTH COPYRIGHT LAW SYMPOSIUM. By Nathan Burkan, Memorial Competition. New York: American Society of Composers, Authors & Publishers, 1952. Pp. ix, 179.

HANDBOOK OF LAW STUDY. By Ferdinand F. Stone. New York: Prentice-Hall, Inc., 1952. Pp. v, 164. $2.95.

THE LAW OF MUNICIPAL CONTRACTS WITH ANNOTATED MODEL FORMS. By Charles S. Rhyne. Washington: National Institute of Municipal Law Officers, 1952. Pp. 3, 192. $7.50.

CASES AND MATERIALS ON TORTS. By Young B. Smith and William L. Prosser. Brooklyn: The Foundation Press, Inc., 1952. Pp. ix, 1239. $9.00.

JURISDICTION AND JUDGMENTS. By William Wirt Blume and Charles W. Joiner. New York: Prentice-Hall, Inc., 1952. Pp. v, 718. $8.75.

STATE AND LOCAL TAXATION, CASES AND MATERIALS. By Jerome R. Hellerstein. New York: Prentice-Hall, Inc., 1952. Pp. v, 871. $9.75.

1950 ANNUAL SURVEY OF AMERICAN LAW. Edited by William Tucker Dean, Jr. New York: New York University School of Law, 1951. Pp. vii, 915.

LAWYERS' CONFIDENTIAL GUIDE, 1951-1952. Edited by James H. Kirby. Chicago: Lawyers' Confidential Guide, 1952. Pp. 1, 19. $5.00—includes the book and confidential reports.

PAPERS ON FLORIDA ADMINISTRATIVE LAW. Edited by Ernest R. Bartley. Gainesville, Fla.: Public Administration Clearing Service of the University of Florida, 1952. Pp. 9, 95.

LEGAL AID CONTRIBUTIONS TO THE RELIEF OF INADEQUACY STATES IN DOMESTIC RELATIONS. By John H. Mariano. New York: Council on Marriage Relations, Inc. 1952. Pp. 1, 44. $.50.

FLUORIDATION OF MUNICIPAL WATER SUPPLY—A REVIEW OF THE SCIENTIFIC AND LEGAL ASPECTS. By Charles S. Rhyne and Eugene F. Mullin, Jr., Washington: National Institute of Municipal Law Office, 1952. Pp. 1, 62. $3.00.

MISSISSIPPI LAWYERS!

HAVE YOU OFTEN WONDERED WHETHER YOUR LAW JOURNAL CONTAINED A DISCUSSION OF THE POINT YOU ARE BRIEFING?

Now you can make the MISSISSIPPI LAW JOURNAL a regular part of your research. There may be a case comment on your leading precedent, a student note on your major point, or a feature article to give you the very background you need for your brief.

A glance at the new index for Volumes I-XX of the MISSISSIPPI LAW JOURNAL will tell you whether your point has been discussed.

Leading articles are indexed by topic, title, and author, notes by topic, and case comments by name and subject matter, in addition to tables of cases and statutes.

Order your copy today. The supply is limited.

Mississippi Law Journal Index

VOLS. I-XX — PRICE

Unbound $3.50

Buckram Bound $7.00

ADVERTISEMENT

Hine's Insurance Counsel

1952 Edition has

received ABA Certificate

of Approval

★

PUBLISHED ANNUALLY SINCE 1908

★

Serves the legal and claim departments of the Insurance and Transportation Companies. Listing space available to qualified attorneys. Write today for information.

HINE'S LEGAL DIRECTORY, INC.

First National Bank Bldg. **Chicago 3, Ill.**

DELAWARE

for ☆

Approved Corporations

Corporations formed upon telephonic instructions. Approved organization forms, exact cost, precedents, and our DIGEST of the law, furnished gratis to lawyers upon request. Over 50 years' service to lawyers.

Corporation Service Company

Delaware Trust Bldg. Telephone 6-8305 Wilmington 99, Delaware

Members:

HERMAN GLENN
WILL LEWIS
DAVID G. NEILSON
DAVID G. NEILSON, JR.

ANOTHER MISSISSIPPI INSTITUTION

THE J. E. NEILSON CO.

DEPARTMENT STORE

OXFORD

The Best Place to Shop for More Than 100 Years

CHANGE OF ADDRESS

Each member of the Mississippi Bar in good standing is entitled to receive the Mississippi Law Journal. If you are not receiving your Journal, notify the Secretary, Mississippi State Bar, New Capitol, Jackson, Mississippi.

MISSISSIPPI LEGAL FORMS ANNOTATED

By: William Eugene Morse
(Of the Jackson Bar)

A compilation of Accurate, Standard and Traditional Forms of Pleading and Practice in the Supreme Court, Chancery, Circuit, County and Justice Courts, based on the 1942 Mississippi Code.
Contains approximately 2,000 forms, giving customary terminology of similar instruments that have been passed on by the courts.
A majority of the forms are annotated from the decisions of the Supreme Court of Mississippi.

Bound with a Pocket Supplement compartment

Two Volumes, $35.00 delivered

MISSISSIPPI CRIMINAL LAW AND PROCEDURE

By: Earl L. Wingo
(Of Hattiesburg Bar)

A practice manual, containing 41 chapters, covering all important crimes, including new subjects in Mississippi, such as Arrests, Searches and Seizures, Extradition, Continuance, Culpable Negligence, etc.
Saves time in research and is a quick ready reference manual during the trial.
Provided with Pocket in the back for supplements as the need arises.

One Volume, $18.00 delivered

THE LAW OF OIL and GAS

By: W. W. Thornton
(Former Judge of the Superior Court of Indiana)

Fifth Edition

Revised and rewritten by Simeon S. Willis
(Judge of the Court of Appeals of Kentucky)

6 Volumes with Recompiled Vols. 5 and 5 and 1952 Cumulative Pocket Parts, $75.00 delivered.

This is your sandard and always up to date authority on the law of Oil and Gas including Forms of Oil and Gas Leases, Contracts, etc., together with annotated Statutes and Regulations pertaining to Natural Gas and Oil.

Descriptive circulars mailed on request.

THE HARRISON COMPANY

Law Book Publishers

93 Hunter Street S. W. Atlanta, Ga.

FEDERAL ADMINISTRATIVE LAW

By an Outstanding Practitioner

and

Widely known authority on

Administrative Law

URBAN A. LAVERY, M.A. J.D.

of the Chicago Bar

and the

Bar of the Supreme Court of the

United States

Full details furnished on request

WEST PUBLISHING CO. ST. PAUL 2, MINN.